the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Docket Entries

Superior Court of the District of Columbia
Criminal Division

Date	Entries	Judge
Feb. 23, 71	Indictment filed, assigned to Judge Korman, arraign. set Mar. 3, 1971.	
Mar. 3, 71	Defendant Informed of Complaint(s) and Right to Counsel. PLEA: Not Guilty. Continued to 3-31, Jury. Bond $2400.00. All pretrial motions to be filed not later than 3-18; response to be filed not later than 3-24. Hearing on pre-trial motions/ dispositions 3-30.	Judge Korman
Mar. 31, 71	Demand for jury trial withdrawn, plea of not guilty remains, trial by the court. Motions to dismiss indictment and to suppress evidence heard before trial. Motions denied. Stipulation as to substance of trial testimony filed herein. Judgment guilty. Continued to 4-27-71 at 10:00 o'clock a.m. for sentencing. Defendant referred to Probation Office for a presentence screening report. $2400.00 bond remains, defendant advised fully of penalties.	MDK
Apr. 27, 71	2-6 years. Defendant will serve 6 months. Execution of remainder sentence suspended. Probation—Six(6). Defendant committed w/o bond pending appeal. Committed.	MDK
May 4, 71	Notice of appeal filed.	DM

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on February 1, 1971

THE UNITED STATES OF AMERICA v. ROOSEVELT F. PALMORE	Criminal No. 9217-71 Violation: 22 D.C. Code 3204 (Carrying a Dangerous Weapon)

The Grand Jury charges:

On or about January 16, 1971, within the District of Columbia, Roosevelt F. Palmore did carry, openly and concealed on or about his person, and not in his dwelling house and not in his place of business and not on other land possessed by him, a dangerous weapon capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

/s/ THOMAS A. FLANNERY
Attorney of the United States in and for the District of Columbia

A TRUE BILL:
/s/ LEONEL S. MOSLEY
Foreman.

[Caption Omitted]

INFORMATION OF PRIOR CONVICTION

Comes now the United States Attorney for the District of Columbia and informs the Court as follows:

1. The defendant, Roosevelt F. Palmore, has been indicted in the above captioned case, pending before this Court, on a charge of Carrying a Dangerous Weapon in violation of 22 D.C. Code § 3204;

2. That the said Roosevelt F. Palmore is the same Roosevelt F. Palmore who pleaded guilty on July 22, 1965, in the United States District Court for the District of Columbia to the offense of Attempted Robbery in violation of 22 D.C. Code § 2902 (Criminal No. 451-65);

3. That the offense of Carrying a Dangerous Weapon is punishable by imprisonment for not more than ten years when committed by a defendant who prior to his commission of that offense has been convicted of a felony in the District of Columbia (or in any other jurisdiction);

4. In consideration of the foregoing, the Court is advised that if the said defendant in the above captioned case is convicted of the offense of Carrying a Dangerous Weapon, he may be sentenced to imprisonment for a term as long as but not more than ten years.

[Signatures Omitted]

[Caption Omitted]

Motion to Dismiss Indictment

Defendant respectfully moves the Court for an order dismissing the indictment herein on the grounds that (1) this Court, not being a court ordained and established pursuant to Article III of the Constitution of the United States, lacks jurisdiction to exercise the judicial power of the United States in the hearing, trial and disposition of this case. * * *

In support of this motion, defendant respectfully refers the Court to his memorandum of points and authorities filed and served herewith.

Wherefore, this motion should be granted, and the Court should dismiss the indictment on the ground that it lacks jurisdiction. * * *

[Signatures Omitted]

[Caption Omitted]

MOTION TO SUPPRESS EVIDENCE

Pursuant to Rules 12(b)(3) and 41(g) of the Criminal Rules of this Court, defendant respectfully moves the Court for an order suppressing as evidence a pistol allegedly found by police officers in defendant's automobile on or about January 16, 1971, and any oral testimony relating or referring to said pistol from said police officers on the grounds that the circumstances under which the said pistol was allegedly found violated defendant's rights under the Fourth Amendment to the Constitution in that: (1) the stopping of defendant's automobile for the purpose of conducting a "routine spot check" constituted an arrest of defendant without probable cause in violation of the Fourth Amendment; (2) assuming *arguendo* that the initial stopping of defendant's automobile for the purpose of conducting a "routine spot check" constituted only a momentary detaining of the defendant, the police officers prolonged the detention beyond that necessary to ascertain that defendant possessed a valid operator's license, thereby converting the detention into an arrest of defendant without probable cause in violation of the Fourth Amendment; and (3) the pistol was allegedly discovered during an unlawful search of defendant's automobile, which search was not incident to a lawful arrest nor pursuant to a valid search warrant, in violation of defendant's right to be free from unreasonable searches and seizures as guaranteed to him by the Fourth Amendment.

In support of this motion, defendant respectfully refers the Court to his memorandum of points and authorities filed and served herewith. In further support of this motion, defendant requests an evidentiary hearing.

WHEREFORE, this motion should be granted, and an order should be entered suppressing as evidence a pistol allegedly taken from defendant's automobile on or about January 16, 1971, and any oral testimony relating or referring to said pistol from the arresting officers.

[Signature Omitted]

[Caption Omitted]

WAIVER OF TRIAL BY JURY

Defendant hereby waives trial by jury on the indictment herein.

/s/ Roosevelt F. Palmore
ROOSEVELT F. PALMORE
Defendant

/s/ Frank F. Flegal
FRANK F. FLEGAL
1819 H Street, N.W.
Washington, D.C. 20006
(293-6250)
Attorney for Defendant.

The United States consents to defendant's waiver of trial by jury.

/s/ Warren R. King
WARREN R. KING
Assistant United States Attorney

APPROVED:
/s/ MILTON D. KORMAN
Judge
March 30, 1971.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Proceedings—March 31, 1972

[3] THE DEPUTY CLERK: Your Honor, the matter on the calendar this morning is the case of United States versus Roosevelt Palmore. Mr. Flegal. Mr. King for the government.

MR. FLEGAL: The defendant is ready, Your Honor.

MR. KING: The government is ready, Your Honor.

THE COURT: Are you Mr. Palmore?

MR. PALMORE: Yes, I am.

THE COURT: Will you look at this paper, please, sir, and tell me whether that's your signature on there?

MR. PALMORE: Yes.

THE COURT: Stand up, please, sir.

Do you know what that paper is, Mr. Palmore?

MR. PALMORE: Yes. It's a waiver of jury.

THE COURT: You understand, sir, that under the Constitution you have a right to a trial by a jury if you want one?

MR. PALMORE: Right.

THE COURT: By this paper you say that you want to give up that right, to waive your right to a jury trial. Is that what you want?

MR. PALMORE: Yes, sir.

THE COURT: You have discussed this with Mr. Flegal?

MR. PALMORE: Yes, I have.

THE COURT: And you understand fully what you are [4] doing, and what your rights are?

MR. PALMORE: Yes.

THE COURT: How old are you, sir?

MR. PALMORE: Thirty-four.

THE COURT: And how far did you go in school?

MR. PALMORE: To the tenth.

THE COURT: There is no question about your understanding of what you have done here?

MR. PALMORE: No, sir.

THE COURT: And this is what you want?

MR. PALMORE: Yes.

[Arguments on motion to dismiss indictment on Constitutional Article III issue were stenographically reported, but are not transcribed herein.]

THE COURT: Well, the fact that the Court of Appeals in affirming Judge Corcoran in *Bradford* against *Green*, to use the vernacular, ducked the issue, is not determinative of the proposition, because it is well known that all appellate courts will not decide a question on a constitutional ground if it can be avoided and disposed of otherwise, and I must say that the inclination of this Court is to do the same thing.

Now, I don't know that I can duck the issue, because you have presented it squarely, and while I am not bound by what Judge Corcoran has decided, his is the only decision that touches directly on the very issue that you have raised, and [5] it is rather persuasive.

I would like to call counsel's attention to another case, and it goes back in my time—it is possibly too old for either counsel before me to have read—but it was decided in January of 1940, and it is entitled *Neild* against *The District of Columbia*. Now, this was not a case challenging the jurisdiction of the Court, but actually was a tax case challenging a tax which had then been enacted by the Congress for the District of Columbia, and it was a gross receipts tax, and because some of the receipts were from interstate commerce, the law was attacked on that ground as being outside the jurisdiction of Congress to enact.

Now, I acknowledge that the situation is not the same, but some of the language in this case, which was written by Associate Justice Miller of the United States Court of Appeals, and that my recollection is, is Justin Miller, who is no longer on the Court, and who was a very splendid judge, and concurring with him was Chief Justice Groner—they had the titles of justices in those days—Justice Stevens, who later became chief justice of that court, Justice Edgerton, who recently passed away, and Justice Vinson, who later on went to the Supreme Court of the United States, and became Chief Justice of the United States. I read you from Page 309 of 71 Appeals, D.C., the case commencing on Page 306. It is also found in 110 F.2d at Page 246 apparently.

[6] "Power to legislate for the District of Columbia is expressly delegated by the Constitution. Article I, Section 8, Clause 17, gives to Congress power to exercise exclusive legislation in all cases whatsoever over such District, not exceeding ten miles square, as may, by Cession of partic-

lar States and the acceptance of Congress, become the seat of the government of the United States."

They have italicized the words exclusive legislation in all cases whatsoever.

"That delegation is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government. Within the District of Columbia there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof, which includes within its breadth all proper powers of legislation. Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government,"—I don't think that applies here—"Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact,"—and this is important—"In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control [7] as contrasted with the limited power of a state legislature on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."

Now, in a footnote we find these citations and statements, among others. A citation to *Wight* against *Davidson* at 181 U.S. at Page 371, holding the Fourteenth Amendment inapplicable to the District of Columbia. On the other hand, the rights and liberties protected by the Bill of Rights in Amendments One to Eight against encroachment by the national government has been held applicable to the District, although not to the states, thus the provisions of the Fourth Amendment are not applicable to the states, and they cite cases. The Fifth Amendment requires that a person in the District shall not be tried for the commission of a crime unless on presentment or indictment by a grand jury—they cite a case—whereas so far as the states are concerned this may be dispensed with—and they cite cases. Double jeopardy is prohibited in cases of crimes committed in the District—and then they cite a case—but a like prohibition does not apply to state action—and citing *Caline* against *Wilson* in 127 U.S.—it was held that under the Sixth Amendment one charged with a crime in the District

is entitled to a jury trial, although the right to such trials may be abolished by the states. Likewise the right to trial by jury is in common law actions as provided by the Seventh Amendment is a limitation upon the District, but not [8] upon the states.

So that they point out that there are many differences between the approach, both civil and criminal law, in the District of Columbia vis-a-vis the states. Congress is the legislature for the District of Columbia, and under this broad language, as well as some of the citations by Judge Corcoran, and the other rationale, it seems to me that Congress can, when they legislate for the District of Columbia, and this statute under which this indictment is laid is a statute for the District of Columbia, can set up a court system here to enforce that law which is passed for the District of Columbia. This is not a court which tries acts of Congress which are applicable nationally; it is a court which is set up by Congress to enforce the laws which Congress enacts for the District of Columbia, and the fact that this man may be tried in an Article I court here, and might, if he violated a national law, be triable only in an Article III court elsewhere than in the District of Columbia, to me is not a basis for striking down the jurisdiction of this court. Congress has retained in the District the United States District Court—not only now, but later—and those acts which are applicable nationally, which are violations of act of Congress nationally applicable are tried there in the United States District Court, and not here, so that they have made a distinction. Having in mind what I read to you here from the *Neild* case, and the reasoning [9] of Judge Corcoran in the *Bradford* versus *Green* case, I find difficulty in buying your argument, Mr. Flegal. I am persuaded that the Congress has the right, aside from what Judge Corcoran said, on the basis of what I read to you here from *Neild*, plus what Judge Corcoran says, a right to set up this court, be it an Article I court, to try those who violate the laws which Congress has enacted for the District of Columbia. The Congress sits, when it enacts for the District of Columbia, in both capacities, says *Neild* —as a local and a national legislature, and as such I don't see any basis for the contention that this man cannot be tried perfectly legally and constitutionally in this court in

violation of this act enacted by Congress for the District of Columbia.

I will deny your motion on that basis.

• • •

[10] MR. FLEGAL: Your Honor, the third motion before Your Honor—the third motion, the second issue before Your Honor this morning is the defendant's motion to suppress evidence.

Both parties have filed memoranda, and I move for an evidentiary hearing as necessary to Your Honor's disposition of this motion.

[11] THE COURT: All right, sir. You may put on whatever you want in that regard.

MR. FLEGAL: Fine, Your Honor.

May I also ask for the invocation of the rule on witnesses on this motion? I notice some witnesses from both sides are in the courtroom.

THE COURT: Yes. All witnesses on both sides will retire to the witness room until called, for the government and for the defense.

MR. FLEGAL: On the hearing on the motion to suppress, Your Honor, the defendant will take the stand as the defense's first witness.

[The testimony of Mr. Roosevelt Palmore was stenographically reported, but is not transcribed herein.]

MR. FLEGAL: The defendant calls Lillian Payne to the stand, Your Honor.

[The testimony of Miss Lillian Payne was stenographically reported, but is not transcribed herein.]

MR. FLEGAL: Your Honor, the defendant will rest.

THE COURT: Does the government offer any evidence?

MR. KING: Yes, Your Honor. I am going to call Officer Paul Busker.

OFFICER PAUL K. BUSKER,

having been called as a witness on behalf of the government, and having been previously duly sworn, was examined and testi- [12] fied as follows:

DIRECT EXAMINATION

By MR. KING:

Q. Officer, please, in a loud, clear voice, state your full name, and duty assignment.

A. Officer Paul K. Busker, Metropolitan Police Department.

THE COURT: [Spelling] B-u-s-t-e-r?

THE WITNESS: [Spelling] B-u-s-k-e-r. Metropolitan Police Department, assigned to the Fourth District investigators.

By MR. KING:

Q. Now, Officer Busker, directing your attention to the 16th of January, of this year, what was your duty assignment?

A. Special Operations Division.

Q. Were you on duty that day?

A. Yes, I was.

Q. Directing your attention to about 8:00 p.m., did you have occasion to make an arrest?

A. Yes, I did.

Q. Were you—would you describe the type of automobile that you were in, and how you were dressed?

A. Yes. I was dressed in casual clothes, street clothes, and I was driving an unmarked police cruiser.

Q. Now, did you have a partner?

[13] A. Yes, I did.

Q. Who was your partner?

A. Officer Morrissette.

Q. Now, you said that you did—had occasion to make an arrest on that date at about 8:00 p.m. Would you relate to His Honor, please, the circumstances that led up to that arrest?

A. Yes. We observed a vehicle with Virginia rental tags—I believe they were 87311—on Florida Avenue, Northwest. We stopped the vehicle.

Q. Now, you said at Florida Avenue, Northwest. Where on Florida Avenue?

A. This was—we first saw the—we first saw the vehicle in the 600 block of T Street, Northwest, and then the vehicle went east on T, and made a left, and then went out west on Florida Avenue.

THE COURT: That's almost a U-turn, isn't it?

THE WITNESS: Yes, sir. There is a—there is—T Street

intersects with Florida. There is a drive like, or an island like where you can make a left turn and go back west on Florida Avenue.

THE COURT: Well, T Street and Florida Avenue almost run parallel, or at least T Street runs due east and west, and Florida Avenue runs southeast, northwest. They come to a point there, do they not?

[14] THE WITNESS: Yes, sir, They intersect right in the 900 block of ——

THE COURT: The point I'm making is that to go west on Florida Avenue from T Street—from east on T Street, you practically make a U-turn, do you not?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

By MR. KING:

Q. Now, Officer, you stated that this was a Virginia rental car?

A. Yes, it was.

Q. Would you explain how you knew it was a Virginia rental car?

A. Because of the Virginia rental tags are—the tag number was 87311. Virginia rental tags are all in that—not in that series—they start at 70000, and then there is a dash, and they have three numbers, and they go up and include 99000, dash, and three numbers.

Q. How do they differ from other Virginia tags?

A. The regular Virginia tags are proceeded by the letter A, and then have six numbers, or they just have six numbers.

Q. A, and six numbers, or six numbers?

A. Yes.

Q. Is it possible for a car to have five digits and not be a rental car?

[15] A. Yes, it is.

Q. Would you explain how that is?

A. This would just be lower tag numbers that are not included in the 70000 up to 99000 series, but——

Q. Well, then would a license tag 43-299, would that be a rental car?

A. No, it would not.

Q. Now, you said the automobile turned onto Florida Avenue. And what did you do?

A. We fell in behind the car at this time.

Q. And did you have cause ultimately to stop that car?

A. Yes, we did.

Q. And where did you stop the car?

A. We stopped the car on Florida and Vermont, Northwest.

Q. Now, who was driving that car?

A. Mr. Palmore.

Q. Would you describe what he's wearing, please?

A. Yes. He's sitting to my right. Has a grey suit, and a blue shirt.

Q. Now, you say the car stopped at Florida and Vermont?

A. Yes, sir.

Q. Now, does Florida and U Street merge in any way at that point?

A. Yes. I believe on the other side of Vermont it's U Street, and on the east side of Vermont I think it's still [16] Florida.

Q. Now, where exactly did the car stop?

A. Right at the intersection of Vermont and Florida Avenue. That would be on the east side of Vermont.

Q. Now, where did Mr. Palmore's car stop with respect to your own car?

A. In front of us.

Q. Now, when the car stopped, would you explain please first what Mr. Palmore did?

A. The car stopped, and Mr. Palmore got out of his car.

Q. And when he got out of his car, where, if anywhere, did he go?

A. He started walking back towards our car.

Q. Now, when the car stopped shortly after, what did you do?

A. I immediately got out of my car, and started walking toward his car.

Q. And did there come a time when you and Mr. Palmore stopped?

A. Yes.

Q. And where?

THE COURT: By the way, who was driving the car you were in?

THE WITNESS: I was.

By Mr. King:

[17] Q. About where, with respect to Mr. Palmore's car, did this take place?

A. We met roughly in the area of the rear—left rear door of his car.

Q. Now, Officer Busker, I want you to explain what your partner, Officer Morrissette did upon the stopping of your car?

A. Officer Morrissette got out of the car—our car at the same time I did, and he walked from our car up to the right front door of Mr. Palmore's car.

Q. How was Officer Morrissette dressed?

A. He was dressed in the same attire I was.

Q. Did you observe what, if anything, Officer Morrissette did, or was doing, after he arrived at the right-hand side of the car?

A. No, I could not see what he was doing at that time.

Q. What equipment, if any, did Officer Morrissette have with him?

A. He had a flashlight with him.

Q. Now, would you explain, please, to His Honor, the result of your meeting Mr. Palmore next to his car, and any discussions that you might have had with him?

A. Yes. I asked Mr. Palmore for his driver's license, his permit, and the rental agreement to the vehicle.

Q. And did he produce the driver's license?

A. Yes, he did.

[18] Q. And did he—where was the driver's license? Was it on his person at that time?

A. Yes, it was.

Q. Did he produce that to you at that point?

A. Yes, he did.

Q. You also asked him for the rental agreement; is that correct?

A. Yes, sir.

Q. Did you specify rental agreement?

A. Yes, I did.

Q. And did he comply with your request?

A. He did not have—not at that time, no.

Q. Well, what did he do in response to your request?

A. He went back to the vehicle to get the rental agreement out of the glove compartment.

Q. And did he then give you the rental agreement?

A. Yes, he did.

Q. Do you recall looking at that rental agreement?

A. Yes, I do.

Q. Do you know from the rental agreement, or can you recall from the rental agreement the corporation or the company from which he had rented the car?

A. Yes. It was Avis Rental Company.

Q. Do you recall from your viewing the contract when the car had been rented?

[19] Mr. Flegal: Objection, Your Honor. The document itself is the best evidence of that, and I would like some *voir dire* on this as to what happened to that document.

The Court: All right.

By Mr. Flegal:

Q. Officer Busker, did the defendant give you a copy of his rental agreement?

A. Yes, he did.

Q. And did you keep that copy?

A. Until we got into the station, yes.

Q. And then what did you do with it, sir?

A. I turned it over to somebody that came from Avis to pick up the car.

The Court: You turned it over to whom?

The Witness: Somebody that came from Avis. We called Avis, and told them that we had the car. They came to 3-D-1 and picked the car up, and I gave them the agreement.

Mr. Flegal: Your Honor, I object to the testimony. The document itself is the best evidence of what's in the agreement. He had it, and gave it back.

The Court: Well, if the agreement's existence and location has been accounted for, secondary evidence, it seems to me, may be introduced as to its contents. The primary evidence is proper to be introduced if it's available, but it's not.

[20] Mr. Flegal: May I continue the *voir dire* for just a minute?

The Court: Sir?

Mr. Flegal: May I just ask one or two more questions?

Mr. King: Your Honor, before he does that might I address myself to this. The purpose of this line of inquiry is to determine what the officer's reaction was and what he

determined from looking at the rental agreement. I'm not offering the rental agreement as proof that the car was overdue; I am only inquiring as to the rental agreement so that we can determine what the officer ——

THE COURT: I assume, without knowing definitely, that what we're about to get into is the question of what the officer did thereafter, and whether or not it was reasonable, and for these purposes hearsay is admissible, even if it wasn't true, if the officer saw something and believed it. I mean we're in the same situation as if an officer made an arrest for believing that a felony had been committed on the report to him of another person that a felony had been committed. Even if the person had given him false information, if the officer heard it, and believed it he may testify to that as explanatory of his actions. On that basis I will let him testify.

MR. KING: Thank you, Your Honor.

By MR. KING:

[21] Q. Officer, I show you what has been marked as Government's Exhibit 1 for identification, and ask you whether that is familiar to you?

A. Yes, it is.

Q. How is it familiar to you?

A. This is a rental agreement from Avis, given to customers that rent cars from Avis.

Q. Now, is that the same piece of paper that Mr. Palmore gave you?

A. Yes, I believe it is. Maybe. The other one might have been pink—the copy I got.

Q. So, it's not the exact same piece of paper that he gave you?

A. It might not be.

Q. But is that a copy, as best you can determine, of the piece of paper that Mr. Palmore gave you?

A. Yes, it is.

Q. And does that piece of paper indicate the expiration date of the rental agreement with Mr. Palmore?

A. Yes, it does.

Q. And what is that date?

A. January 12th.

Q. Now, the piece of paper that you saw, I believe you said it was pink, did it, as far as you can recall, in any way

reflect a date other than January 12th as the termination [22] date for the rental agreement?

A. No, sir; it did not.

Q. Thank you, Officer. Now, I believe you testified that Officer Morrissette was on the other side of the car at this time while you were looking at the rental agreement; is that correct?

A. Yes, he was.

Q. Now, would you relate to what occurred subsequent to Mr. Palmore presenting you with the rental agreement?

A. Yes. As I was talking to Mr. Palmore about the rental agreement, Officer Morrissette stated to me from the other side of the car where he was that there was a gun in the car.

Q. And what, if anything, did he do then?

A. Officer Morrissette then came around from the passenger's side, around the front of the car to the driver's side, and lifted up the armrest, and pulled out the gun.

Q. Did he get into the car when he—to recover the gun?

A. Pardon me?

Q. Did he get into the car to recover the gun?

A. Yes, as far as he had to go. Over to the armrest.

Q. But when he exited from the car, he had a gun in his hand?

A. Yes, he did.

Q. Thank you. I have nothing further, Your Honor.

[23]

CROSS-EXAMINATION

By Mr. FLEGAL:

Q. Officer Busker, why did you stop the defendant's car?

A. For a spot check, and also the Virginia rental tags, we come across a lot that are rented and not taken back on the proper date.

Q. For both of those reasons?

A. Yes.

Q. What is a spot check, Officer?

A. A spot check is to determine if a driver has the proper license, (and registration, or rental agreement).

Q. Had you ever received instructions from the police department on spot checks, either written, or oral?

A. Just to make them.

Q. Who gave you those instructions, sir?

A. The commanding officer of S.O.D., our lieutenant, and our sergeants.

Q. All right. S.O.D. is Special Operations Division?

A. Yes, it is.

Q. And when did your commanding officer of S.O.D. give you such instructions, Officer?

A. I don't recall when.

Q. More than once?

A. Yes.

Q. What instructions did he give you?

[24] A. I believe they were to make traffic stops?

Q. How many?

A. No set amount.

Q. Did he give you any basis, any instructions, as to who you selected to stop for a traffic stop?

A. No, sir.

Q. How do you select, Officer?

A. I believe this is left up to each individual officer.

Q. Right. I understand. How do you select?

A. How do I select?

Q. Yes.

A. On a given time it varies. I don't select anyone on any certain basis.

Q. How many spot checks do you make in an average—what do you have, an eight-hour shift of duty?

A. Yes.

Q. On an average eight-hour shift of duty?

A. I have no idea. This depends on the area I'm working, the day of the week, the tour. I have no idea.

Q. How long had you been out in the Vermont and Florida area around January 16th? Had you been there more than one day?

A. I don't understand the question.

Q. How long had you been assigned to the area that you were in the day this happened?

A. I don't know, because we were working old clothes, and [25] they just assigned us to the district, I believe.

Q. Anywhere in the district?

A. Yes.

Q. How many spot checks—how long had you been assigned in old clothes?

A. I was—went into old clothes in November, of 70.

Q. So, at the time this happened, roughly two months of old clothes duty?

A. Yes.

Q. How many spot checks had you made during that time?

A. I have no idea.

Q. How many spot checks did you make on the night that this incident took place?

A. I have no idea.

Q. More than one?

A. I believe so, yes.

Q. How long had you been on duty that night?

A. I believe we were working 2:00 to 10:00, so I came on at 2:00 in the afternoon.

Q. Been on about six hours when this happened?

A. Yes.

Q. Do you keep a list of the spot checks you make?

A. No, I don't.

Q. What was the traffic condition when you first observed the defendant's car?

[26] A. When I first observed it?

Q. Yes.

A. Nothing. No traffic at all.

Q. No traffic at all. He was the only car on the road?

A. On T Street, yes.

Q. What—were you driving, or stopped when you first saw his car?

A. I was parked.

Q. Were you the only police car parked there, or was there another police car parked with you?

A. I believe there was another car parked on T Street.

Q. When did you decide to make a spot check of Mr. Palmore's car?

A. When I first saw the car go by.

Q. And how far did the car go before you pulled it to the—how did you pull it to the side of the street? With your red lights?

A. The red lights on an unmarked cruiser are in the grill, so yes I did activate the red light.

Q. How far did the car go before you activated the red light from the time you first saw him?

A. I believe when it made the left off T onto Florida, across Georgia Avenue, and I think as quick as I got across Georgia Avenue, if I recall, I turned on the red lights.

Q. So that is—am I correct, that's a block, plus a [27] turn?

A. Yes.

Q. And how far did the car go before it stopped?

A. From Georgia to Vermont.

Q. Half, three-quarters of a block? Something like that?

THE COURT: That's about two blocks, three blocks.

MR. FLEGAL: Two blocks.

By MR. FLEGAL:

Q. Did you ever receive any instructions from S.O.D. or anyone else, Officer, concerning rental car inspections?

A. How do you mean?

Q. I understood you had two grounds for this stop; a spot check for operator's permit, and because it was a rental car?

A. Right.

Q. Did you ever receive any instructions on stopping and inspecting rental cars?

A. No, not rental cars per se. No.

Q. Why do you stop and inspect rental cars?

A. Why do I stop them?

Q. Yes.

A. Because, like I stated before, a lot of these cars are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car.

[28] THE COURT: Six thousand dollars worth of dope?

THE WITNESS: Yes, sir.

By MR. FLEGAL:

Q. Do you stop rental cars because you might get $6,000 worth of dope out of the car, Officer?

A. No, I do not.

Q. How do you know that rental cars are often overdue in their agreements?

A. From past experience of stopping rental cars.

Q. How long have you been stopping rental cars, Officer?

A. For over a year. I don't ——

Q. How long had Officer Morrissette been assigned with you?

A. I—he wasn't my regular partner, so I don't know. He was assigned with me that night.

Q. Had he been with you a few days before, or was that his first night with you?

A. No. I think we had worked together before, but I don't recall when.

Q. Officer, when you proceeded to make the spot check of the defendant's car, when you proceeded to stop the defendant's car, did the other police car that was parked with you follow you?

A. Yes. I believe they did. Yes.

Q. Do you know who was in that car?

[29] A. Yes, I do.

Q. Who was it, sir?

A. Officer Shaefer, and Officer Campbell.

Q. Of the Metropolitan Police Department?

A. Yes.

Q. When the car first stopped, Officer Busker, and the defendant approached you, did you say anything to him?

A. I asked for his permit and the rental agreement.

Q. And what did he say to you, if anything?

A. I don't recall if he said anything or not.

Q. All right. There came a time, did there not, when he returned to the car to get a rental agreement out of the glove compartment as you testified?

A. Yes, he did.

Q. When he returned to you with that agreement—let me back up a moment. Did you follow the defendant when he went to get that rental agreement, or did you remain stationary?

A. No. I followed him up to the open door.

Q. When he returned from the car with the rental agreement, where were you and he standing, sir, when you were looking at him?

A. Probably—I believe we were right by what would be the post of the—in a sedan car. The post coming down.

Q. By the driver's door?

A. In the rear of the driver's door, yes.

[30] Q. Do you recall, Officer, whether the front door remained open or closed after he came back with the rental agreement?

A. I don't—I believe it was open. I'm not sure.

Q. After he showed you the rental agreement, did you say anything to him?

A. Yes, I did.

Q. What did you say, sir?

A. I asked him about the car being overdue.

Q. How long did that conversation take place, Officer? How long a period of time did it take place?

A. A minute or two.

Q. And during this period of time, do you know what Officer Morrissette was doing?

A. I know he was on the other side of the car. I don't know what he was doing. I couldn't see him.

Q. Did you ever see Officer Morrissette before he said he—there is a gun in the car?

A. Yes.

Q. Did you ever see Officer Morrissette on the driver's side of the car?

A. Not until after he had said there was a gun in the car, no.

Q. Did you ever see Officer Morrissette before he said there was a gun in the car, open the trunk?

[31] A. No.

Q. Did Officer Morrissette ever open the trunk of that car?

A. Not to my knowledge.

Q. That you saw?

A. Not to my knowledge.

Q. Officer, I show you Government's Exhibit 1 for identification, the rental agreement, and I ask you if you see anything on that agreement that was not there when you looked at the defendant's copy of that agreement, other than, of course, the identification sticker?

A. If I see anything that was not there?

Q. Yes, sir.

A. I don't believe this red line up here was there.

Q. Referring to a red line at the upper right-hand corner?

A. Right.

Q. Anything else, sir?

A. I don't believe where it says car picked up by fleet control was there.

Q. All right. Also in the upper right-hand corner.

A. And I don't believe this January 21st was stamped on there.

Q. Okay. Sort of the middle lower left-hand corner?

A. Yes.

[32] Q. Anything else?

A. I don't know if there's anything else or not. I don't know.

Q. Do you recall the mileage being on there, Officer?

A. There is mileage on there; yes, sir.

Q. Do you recall it being there when you looked at the defendant's copy?

A. Just as a matter that I know that it's on every contract. That's the only way.

Q. Do you know about the figures, Officer, the computation of the rental charges were not on there when you looked at the defendant's copy, if you know?

A. I don't know if they were on there, or not.

Q. Okay. Thank you, sir.

[A pause.]

THE COURT: Anything further, Mr. Flegal?

MR. FLEGAL: I beg your pardon?

THE COURT: Anything further?

MR. FLEGAL: Oh, yes. Excuse me. I was just getting some notes.

THE COURT: We are past the normal recess time. Will you be very long with this witness?

MR. FLEGAL: I'm afraid I may be another ten or fifteen minutes, Your Honor.

THE COURT: All right. We'll recess for lunch until [33] 1:45.

MR. FLEGAL: Your Honor, excuse me. Before recess, Your Honor, may be have a similar instruction on witnesses?

THE COURT: Yes.

Mr. Busker, do not discuss this matter with Officer Morrissette during the luncheon break.

THE WITNESS: Yes, sir.

THE COURT: If you talk with him at lunch time. I'm not saying you shan't have lunch together if you want to, but

you must not tell him anything about any details of what was testified to by you.

[Court was recessed at approximately 12:40 p.m.]

AFTERNOON SESSION

[Court was reconvened at approximately 1:45 p.m.]

THE COURT: You may proceed, sir.

THE DEPUTY CLERK: You remain under oath, Officer.

By MR. FLEGAL:

Q. Officer Busker, when you have occasion to make a spot check on an out of state vehicle that is not a rental vehicle, what are you looking for?

A. Driver's license, and registration.

Q. And why are you looking for registration of an out of state vehicle, sir?

A. To show ownership of the car.

Q. And why are you looking for ownership of the car, sir?

[34] A. So the man driving can prove that it's his car.

Q. Do you make any distinction, Officer, between a spot check, and a traffic check?

A. Do I?

Q. Uh huh.

A. No, sir; I don't.

Q. They are the same thing, as far as you are concerned?

A. Yes.

Q. And with rental vehicles, instead of a traffic—or instead of a registration permit, what are you looking for?

A. A rental agreement.

Q. Why are you looking for that, sir?

A. To show that the driver has got the rental agreement, because they don't issue registrations.

Q. Why are you looking to see why the driver has a rental agreement?

A. To make sure that the car is not overdue.

Q. And why are you looking to make sure that it's not overdue, sir?

A. Because it's supposed to be due back at a certain time, and it should be back at that time.

Q. And why are you concerned with whether or not the rental car is returned, sir?

A. Because it's—it's a criminal charge if it's not.

Q. Fine. Thank you. And the basis, as I understood your [35] testimony this morning, Officer, for stopping the defendant's car was both a spot check, or a traffic check, and for a rental agreement check?

A. That's correct. Yes.

Q. Do you recall giving testimony at a preliminary hearing before Judge Bacon, sir?

A. Yes, sir.

Q. Do you recall being asked why you stopped the defendant's car at that hearing?

A. I believe I said for the same reason, spot check or traffic check.

Q. Right. Do you recall mentioning to Judge Bacon a rental agreement check?

A. I don't know if I did, or not. I don't believe so. I don't know.

Q. Do you know, sir?

A. I don't know if I did, or not. No.

Q. Let me show you Page Number 9 of the transcript of that preliminary hearing, Officer, and ask you if that refreshes your recollection?

And does it refresh your recollection, sir?

A. Yes.

Q. And what was your answer that you gave Judge Bacon?

A. I believe the question was why I stopped him. I said for a spot check.

[36] Q. Fine. After the preliminary hearing, Officer, did you have occasion to talk with anyone concerning the incident surrounding this arrest for purposes of your testimony?

A. I don't believe I did.

Q. Did you talk to the U. S. Attorney?

A. Not about my testimony, no.

Q. Did he ask you what happened that night?

THE COURT: At what point are you asking about?

MR. FLEGAL: At any point subsequent to the preliminary hearing with Judge Bacon.

THE COURT: Subsequent to the preliminary hearing.

THE WITNESS: I don't recall.

By MR. FLEGAL:

Q. How about Officer Morrissette? At any time after the preliminary hearing have you discussed the incident with him?

A. Not to my knowledge. I don't know.

Q. You don't remember?

A. No.

Q. Officer, do you know where the gun was found inside the car?

A. Only from what Officer Morrissette told me, yes.

Q. Do you know how far the gun was from the defendant when it was found?

A. From what Officer Morrissette said I can take a [37] guess, yes.

Q. What would that guess be, sir?

A. It would be the distance from the armrest, which was down in the middle of the seat, to the rear of the front door where Mr. Palmore and I were standing.

Q. And what would that be, sir?

A. It would probably be two or three feet.

Q. Do you remember being asked that question at the preliminary hearing, Officer?

A. No, I don't.

Q. Let me show you Page Number 6 of your preliminary hearing transcript, and ask you if that refreshes your recollection, sir?

A. Yes.

Q. And what is your recollection, sir?

A. That a question there was how far the defendant was from the gun when I seized him. I believe that was the question. I said six inches to a foot.

Q. The question is approximately how far would you say his weapon was located when you seized him, and you said six inches to a foot?

A. Yes.

Q. And to what did you have reference at that time, sir?

A. I don't recall. I don't know what I was referring to.

Q. Did you look at the armrest of this car, Officer, [38] yourself? Did you see it?

A. Yes, I did.

Q. Can you estimate for His Honor approximately how wide the armrest is?

A. I believe it's probably six to eight inches wide.

Q. And was it in the down position, or in the up back-in-the-seat position when you saw it, sir?

A. When I first saw it, I believe it was down.

Q. Uh huh.

A. When I first saw it, it was down.

Q. And when did you see it later?

A. Yes, I did.

Q. And what position was it in then?

A. Up.

Q. Do you know how it got up?

A. I believe Officer Morrissette pushed it up.

Q. Do you know when he did?

A. I assume after he got the gun. I don't know.

Q. After the defendant had shown you his driver's license, Officer, and went back into the car to get his rental agreement, as I understood it, at that point had Officer Morrissette said to you, "I see a gun"?

A. No, I don't believe it was. No.

Q. All right. At that point was the defendant free to go as far as you were concerned? If he would have stated, "I [39] don't want to show you my rental agreement," and got in the car to drive off, would you have let him?

A. No.

Q. Did you ever hear Officer Busker say to you, "I told you a rental car was a good case, or a good bust"?

A. I am Officer Busker.

Q. I'm sorry. Officer Morrissette. Did Officer Morrissette ever say to you, or did you hear him say, "I told you a rental car was a good case, or a good bust"?

A. Not to my knowledge, no.

Q. You didn't hear him say that?

A. No.

Q. When you first observed the defendant's car, Officer, and started to make your traffic check, did you say anything to Officer Morrissette while you were together in the car?

A. I might have said we're going to stop that car.

Q. Did he say anything to you?

A. Not to my—I don't know. He might have said okay.

Q. Other than your statement which you may have said, "we're going to stop that car," did you say anything else before you stopped the car?

A. I don't recall. I don't know.

Q. Do you know whether either you or Officer Morrissette

said anything to the other police car that was parked when you first saw the car, or did you signal to that car?

[40] A. I think we had footman's radios that night, and we might have said over the radio we were going to stop this car, yes.

Q. Do you recall whether they said anything back in response to that communication?

A. They might have, said okay, we'll assist, or we'll follow you.

Q. Is it usual for you to have assistance on making a routine traffic check, Officer?

A. I don't know what a routine traffic check is.

Q. I don't either. Let's take out the word routine. Is it usual for you to have assistance in making a traffic check?

A. If another car is in the area they will drive by or assist, yes.

Q. Is it usual for you to have assistance in making a rental agreement check?

A. If another car is in the area, or if they hear the transmission, they will drive by, yes.

Q. When the defendant stopped his car and you pulled behind the defendant, did you say anything to Officer Morrissette, or did he say anything to you as you both proceeded to get out of the car?

A. No, sir. I don't believe so.

Q. At any time after you first saw the defendant, and [41] until Officer Morrissette said, "I have found a gun," save possibly for your statement, "We're going to stop that car," do you recall saying anything to Officer Morrissette, or he to you?

A. I don't remember.

MR. FLEGAL: I have no further questions, Your Honor.

THE COURT: Anything further?

MR. KING: No. I have nothing further, Your Honor.

THE COURT: You may step down.

MR. KING: I call Officer Morrissette, Your Honor.

Your Honor, before we get started may I pass this gun to the bailiff to make sure it's cleared? I'm certain that it is, but I just wanted to double check.

THE COURT: Well, let the other officer check it.

OFFICER JAMES GREGORY MORRISSETTE,

having been called as a witness on behalf of the government,

and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. King:

Q. Officer, state your full name, please?

A. James Gregory Morrissette.

Q. I want you to speak loud enough so that Mr. Flegal and His Honor can hear you.

A. I am Officer James Gregory Morrissette.

[42] Q. Officer Morrissette, what is your duty assignment?

A. Presently assigned to Special Operations Division.

Q. Now, on January 16th, of this year, where were you assigned?

A. I was assigned to Special Operations Division, working casual clothes.

Q. Were you on duty on that date?

A. Yes, sir; I was.

Q. Were you on duty at about 8:00 p.m. on that date?

A. Yes, sir; I was.

Q. Were you a foot patrol, or in a vehicle?

A. Sir, we were riding in a cruiser. It was unmarked.

Q. Now, who is we?

A. Officer Busker and myself.

Q. Now, who was driving this car?

A. Officer Busker.

Q. And you were the passenger?

A. That's correct.

Q. Did you have occasion that evening to make an arrest?

A. Yes, sir.

Q. Would you relate to His Honor, please, the circumstances of that arrest?

A. Yes, sir. Around 8:00 p.m., 8:15, we were sitting in front of the poolhall at, I believe it was the 600 block of T Street. At this time we noticed—Officer Busker noticed a [43] rental vehicle passing us. It had one occupant in it. At that time we pursued the car, which went east on T Street, and made a U-turn on U Street, which was Florida Avenue, heading west on Florida Avenue.

We got to be at Vermont and Florida that Officer Busker —we signaled the man over by using a siren. And at that time we were going to make a spot check.

Q. Now, let me take you to the point where the two cars stopped. Which car was in front, and which car was behind?

A. Sir, the car that we were—the rental car was in front of us.

Q. And the cars were parked on the side?

A. I can't recall, sir.

Q. Now, when the cars stopped, would you relate, please what Mr. Palmore did?

A. What he did?

Q. What he did.

A. Well, when we stopped the car—can I start with what we did, and tie it in?

Q. Okay. Let me ask you what you did when the car stopped?

A. When the car stopped, Officer Busker and myself, we both got out.

Q. Okay. Now, I want you to confine yourself to what you [44] did when you got out?

A. What I did when I got out. I went to the passenger's side of the car that we stopped, and I had a foot——

Q. Now, did you walk directly to the passenger's side?

A. Yes, sir; I did.

Q. Now, where did Officer Busker go?

A. Officer Busker approached the driver—driver's side of the vehicle.

Q. And where was Mr. Palmore at this time?

A. I believe he had the—gotten out of the car. I'm not sure.

Q. Well, where were he and Officer Busker? On which side of the car?

A. They were on the driver's side.

Q. And which side of the car were you on?

A. I was on the passenger's side.

Q. Now, did you go to the driver's side before you went to the passenger's side?

A. No, sir; I did not.

Q. You walked directly to the passenger's side?

A. Yes, sir.

Q. And you got out of the passenger's side of your car; is that correct?

A. That's correct.

Q. Now, after you arrived on the driver's side of the [45] car, what, if anything, did you do?

A. I didn't arrive on the driver's side.

Q. I'm sorry. The passenger's side.

A. I had a flashlight, and I was looking through the window.

Q. Did you observe anything?

A. Yes, sir; I did.

Q. Would you describe, please, what you observed?

A. Yes, sir. On the front seat of the car, under the center-fold armrest, it had an armrest—it was a fold down armrest. I observed what looked to be a pistol. And after closer examination with the light, I knew that it was a pistol definitely.

Q. Now, have you had any experience with firearms?

A. Yes, sir, I do.

Q. What sort of experience with firearms have you had?

A. Just about all kinds.

Q. Well, do you own firearms?

A. Yes, sir; I do.

Q. Have you fired firearms?

A. Yes, sir.

Q. Had you seen weapons similar to the one that you ultimately recovered before?

A. Many times.

Q. Is it fair to say that you would recognize one if you [46] saw one?

A. Yes, sir.

Q. Approximately how far were you standing from the weapon when you saw it?

A. I was just outside of the door. The passenger's door.

Q. And you were flashing a light onto the front seat?

A. Yes, sir.

Q. How much of the gun did you see?

A. I could see the trigger—the hammer mechanism.

Q. Was the rest of the gun, could that be seen as well?

A. No, sir.

THE COURT: Did you say no, sir?

THE WITNESS: No, sir.

By Mr. KING:

Q. Now, after you observed this, what did you do?

A. I signaled my partner, Officer Busker that the man had a gun inside the car.

Q. Did you say that to him?

A. Yes, sir, across the car, because I didn't want to give him a chance to get back in.

Q. And where was Mr. Palmore and Officer Busker at that time?

A. They were just outside the driver's door. Both of them were outside.

[47] Q. And what did you do then?

A. I went around the front of the car, and Officer Busker stayed between the door and Mr. Palmore. I slipped in through the door, lifted up the center fold armrest, and recovered the pistol.

Q. Is that what you recovered? Was that the same thing that you had seen from outside the car?

A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit 2, and ask you if you can identify it?

A. Yes, sir; I can.

Q. And have you seen that weapon before?

A. Yes, sir.

Q. Where have you seen that before?

A. Sir, that was sitting in the—under the center fold armrest in the vehicle that we stopped.

Q. Is that the same weapon that you recovered from the vehicle?

A. Yes, sir.

Q. I show you what has been marked as Government's Exhibit 2-A for identification, and ask you if you can identify that?

A. Yes, sir.

Q. What is it, please?

A. It's a clip to the .45 automatic.

[48] Q. Now, when you recovered the gun, was that clip in the gun?

A. Yes, sir; it was.

Q. Now, Officer, can you estimate, please, approximately how far the gun was from where Mr. Palmore had been sitting in the front seat?

A. It was like when you're sitting in a chair, it would be the right armrest of the chair.

Q. Well, can you estimate in inches how far it would have been from him?

A. I would say with arm's reach. A foot.

Q. About a foot you say?

A. It's not even a foot. It's—your elbow can rest on the armrest.

Q. Now, was this gun subsequently test fired?

A. Yes, sir; it was.

Q. Were you present when that took place?

A. Yes, I was.

Q. What was the result of that test fire?

A. Sir, it fired.

MR. KING: I don't have anything further, Your Honor. Thank you, Officer.

CROSS-EXAMINATION

By MR. FLEGAL:

Q. Officer, when you first observed the defendant's car, [49] did Officer Busker say anything to you, or did you say anything to him when you were parked in front of the pool-hall, I believe you said it was, when you saw his car?

A. That's correct.

Q. Did you or Officer Busker exchange words?

A. Officer Busker, he identified it as being a rental car.

Q. He told you it was a rental car?

A. Yes, sir.

Q. Did he say anything else to you?

A. Not that I can remember.

Q. What significance did you attach to the fact, if any, that it was a rental car?

A. A rental car?

Q. Yes. Officer Busker had told you it was a rental car?

A. That's correct.

Q. What significance, if any, did you attach to that comment?

A. There are rental cars that are overdue from being taken back into the station.

Q. How do you know that?

A. Sir, because we have a stolen sheet that's issued daily in the Special Operations Division, along with other precincts that has a list of stolen vehicles, or reportedly unreturned vehicles.

[50] Q. Uh huh. The rental companies report them as overdue, and it ends up on your stolen list?

A. After a certain period of time.

Q. Right. Did you have such a sheet with you that night, Officer?

A. I can't recall, sir.

Q. Do you recall this vehicle—this particular vehicle—being on such a sheet?

A. No, sir.

Q. Officer Busker was driving, as I understand it?

A. That's correct.

Q. When he started to follow the vehicle, what did you think he was doing?

A. I figured we were going to spot check the vehicle.

Q. What's a spot check, sir?

A. Sir, it's when you pull over a vehicle just to find out if the driver is the owner of that vehicle, or if the driver has or has not a driver's license. You check on the stolen, and you also check on the W.A.L.E.S., which is to see if it has any parking violations out on it.

Q. I didn't—you check on a——

A. It's called W.A.L.E.S. Washington Area Law Enforcement Service.

Q. Thank you, sir. Did you ever receive any instructions, Officer Morrissette, as to making spot checks, either written [51] or oral?

A. Oh, yes. Yes, sir.

Q. How many times?

A. I couldn't give you numbers. It's been said at roll call.

Q. Frequently?

A. Several times.

Q. Several times?

A. Several times.

Q. Did you ever see any written instructions on spot checks?

A. I can't say I have, no. They have issued us sheets that they write down when we make a spot check. We have a sheet that has spaces for information that the department would like. They would like to have the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it.

Q. Anything else?

A. The year, the make. I said the name of the driver, and

his address, his age, his height, weight, everything that's on your driver's permit.

Q. And this is a police department form, or a spot check form? What would you call this form?

A. I can't say it was a police department form, because [52] I believe the police department numbers every form, and I don't believe that there is a number on this form.

Q. Where did you get these forms?

A. They are handed out in the special operations division.

Q. By special operations division——

A. They have a shelf in the file cabinet.

Q. And while you were on special operations division duty, do you note the spot checks you make on such a form and turn them in?

A. Yes, sir.

Q. How many spot checks had you made on January 16th, the date in question, Officer?

A. I don't recall, sir.

Q. More than one?

A. I can't recall that.

Q. Do you recall making—do you recall a spot check other than Mr. Palmore's?

A. No, sir.

Q. What time did you go on duty that day?

A. We were—let's see. I was working—that was 2:00 to 10:00.

Q. And this was approximately 8:00 p.m. in the evening that this incident took place?

A. That's correct.

[53] Q. Do you recall making a spot check—were you on duty the day before this incident?

A. Sir, I couldn't tell you.

Q. How about the day after?

A. I don't know. It might have been my day off. We don't have days off following each other.

Q. Officer Morrissette, when you make a spot check, what information, or what directions did special operations division give you as to those spot checks, if any?

A. You mean as to what cars we may stop?

Q. Uh huh.

A. We could stop the kind of car that maybe a young teenager would be driver that you might think that he was under age and didn't have a permit. You could stop a car

that you suspected might be stolen. You could stop a car that just for not even having a taillight, you can stop the car, and when you inform the driver of the car that his taillight is out you also ask him for his permit and registration.

Q. Officer, have you ever stopped a car which did not have a taillight or a defect which was not driven by a juvenile, which was not a rental car, which you didn't have reason to suspect was stolen, driven by a businessman in a suit, for a spot check?

A. Would you like to repeat that again?

Q. Yes. Have you ever, in your experience with S.O.D. [54] stopped for a routine spot check a car that did not have a taillight or any other mechanical defect, that you observed, that was not driven by a young driver, that was not a rental car, that you didn't believe was stolen, that you had no other basis to single it out from all the other cars, that was driven by a businessman in a suit?

A. I can't recall either way. I could possibly have.

Q. But you don't recall?

A. Normally it wouldn't be my policy.

Q. It would not be your policy?

A. I'm not saying——

Q. But if you had, it would be an exception, and not your policy?

A. I would say so. Yes, sir.

Q. Officer, from the time you left the car, until you observed the gun, what period of time did you suspect elapsed —you estimate elapsed?

A. Maybe two minutes.

Q. What were you doing during those two minutes?

A. Standing on the outside of the passenger's side.

Q. Just standing?

A. Yes, sir. I was observing everything that might be inside the car.

Q. Did you kneel to observe? Crouch down?

A. I didn't. No, I did not kneel, and I did not crouch [55] down.

Q. How did you observe it?

A. Let me see. I didn't see it standing erect. I could see something, but from closer examination, by bending my torso, I could identify what is was.

Q. Okay. Were the windows on the passenger's side open, Officer, or were they closed, rolled up?

A. No, sir. They were closed.

Q. When you and Officer Busker arrived behind Mr. Palmore's vehicle for the spot check, did you say anything to Officer Busker, or did he say anything to you as you exited your car?

A. I can't recall.

Q. What is the purpose of a spot check, as far as you understand it, Officer?

A. It's what I said earlier. Driver's license, registration.

Q. All right. Anything else?

A. I told you. You find out if the car has warrants on it, if it's stolen, if the man has a permit, if he has any felony warrants out for him.

Q. Fine. When you went over to the right-hand side, or the passenger's side of the car, did you expect to find an operator's permit?

A. No, sir, I did not.

[56] Q. How about a registration certificate?

A. You say myself? Did I?

Q. Uh huh. Yourself.

A. No, sir.

Q. Rental agreement?

A. No, sir.

Q. Any information that the car was stolen?

A. No, sir.

Q. What did you expect to find? What were you looking for?

A. I stand on the other side of the car for the protection of my partner, and that's the only reason that we have to stay on the other side of the car.

Q. Was there another police vehicle with you when you made this spot check, Officer?

A. Yes, sir; there was.

Q. And where did it stop relative to your car?

A. That was right behind us.

Q. And did those officers get out of their car? If you know.

A. I believe one did. I'm not sure about the other.

Q. Do you know what he did?

A. The officer that I remember getting out of the car, he came up on the side of the car that I was on.

Q. And helped you look?

[57] No, I wouldn't say he helped me look. He just asked me why we stopped him, I guess. I don't remember what he said.

Q. Do you remember, Officer, after you found the gun, making a comment to Officer Busker, or to anyone else, "I told you a rental car was a good case, or a good bust," or any words to that effect?

A. No, sir.

Q. Did you at any time, Officer Morrissette, before you saw the gun, enter the car?

A. Before I saw the gun?

Q. Uh huh.

A. No, sir.

Q. Did you ever open the trunk of that car?

A. I believe I did.

Q. When?

A. I believe it was at the station.

Q. Did you ever open the trunk of the car on the street location?

A. I can't recall.

Q. Could you have?

A. I could have, yes.

Q. Would it have been your policy to do so?

A. Not on my own.

Q. What would it take to get the trunk open, if it wasn't on your own?

[58] A. It would be since I was not the senior officer, and I'm not that familiar with the type of searches, I would let the senior officer do it.

Q. And do you recall—you would let the senior officer give you the instructions, or open it himself?

A. Sir?

Q. Let the senior officer do what, sir?

A. If the senior officer wanted to search the trunk, then I would open it up.

Q. And who was your senior officer that night?

A. That was Officer Busker.

Q. Do you recall whether or not Officer Busker gave you such instructions?

A. On the scene?

Q. Yes.

A. No, sir.

Mr. Fingal: I have no further questions, Your Honor.

The Court: Any redirect?

Mr. King: Just one or two matters of redirect, Your Honor.

REDIRECT EXAMINATION

By Mr. King:

Q. Officer, you testified that when you went on the right-hand side of the car, that you did it for the protection of the other officer; is that correct?

[59] A. That's correct, sir.

Q. Now, while you were there, did the defendant remain outside the car the entire time, do you recall?

A. Are you saying that once he got out of the car from the traffic stop, did he enter the car again?

Q. Yes.

A. Yes, sir; he did.

Q. Did you see why he entered the car?

A. He was getting, I thought it was the registration, out of the glove compartment.

Q. Now, you say that you go to the other side of the car for the protection of the officer?

A. Right.

Q. Would you explain what you mean by that?

A. Simple. The man that—say if he got out of the car, he was going back in, my partner is at a disadvantage, because he couldn't see around the man. The man could feasibly have a gun in the glove compartment. He could have numerous things in the glove compartment that he could be charged with.

Q. And your purpose in standing there is to observe what the man does when he entered the car, or what may be within his reach; is that correct?

A. That's correct, sir.

Mr. King: I have nothing further, Your Honor.

Mr. Fingal: One question, Your Honor.

[60]

RECROSS-EXAMINATION

By Mr. Fingal:

Q. You said that he may have, as I understood your testi-

mony, Officer, something in the glove compartment that he may be charged with?

A. Go ahead.

Q. Is that what you said?

A. That's what I said.

Q. What did you mean?

A. What I meant was guns, knives.

Q. Something that would constitute a criminal offense?

A. That could be harmful to my partner.

Q. And also constitute a criminal offense?

A. I didn't say that.

Q. What did you mean when you said charged with, sir?

A. Sir?

Q. What did you mean when you said charged with?

A. If the man leaped into the glove compartment and came out with a knife, he could be charged with that.

Q. Fine. Thank you, sir.

MR. KING: Nothing further, Your Honor.

THE COURT: You may step down.

MR. KING: Your Honor, we have nothing further at this hearing.

MR. FLEGAL: The defense will have no rebuttal, Your [61] Honor.

THE COURT: Well, now we're in a rather unusual situation. We started out to hear a motion to suppress, and there was a withdrawal of a demand for a jury trial. I don't know that there is much more that could be heard on the whole case. Does counsel wish to put on anything more on the case as a whole? It would seem to me that the matter can be disposed of in its entirety without having a ruling on the motion, and——

MR. FLEGAL: Your Honor, may I just briefly outline the procedure that Mr. King and I have discussed at some length, and I think we have——

THE COURT: Should I read this stipulation first?

MR. FLEGAL: It's perfectly all right with me if you will, and we can explain it when we—we were a little more detailed than Your Honor was, and I want to explain what we had contemplated, which was after Your Honor ruled on the motion to suppress, that we would enter into a stipulation, such as I have handed up to Your Honor, that you might consider the testimony of the police officers given at the hearing as if repeated before you at a trial, and then

you will notice that we have two technical matters which we have stipulated to, and the reason we did it this way is we want to be very sure—the defense wants to be very sure of two things: First, that it protects its evidentiary objection in the event we don't prevail [62] on the motion to suppress, and second, that the defendant had elected to exercise his right under *Simmons* to testify at the suppression hearing, but he may not wish to exercise that right at trial, and I think that the stipulation we have proposed meets the very practical point Your Honor has raised and does so in a procedurally fair way.

Mr. King: I would ask Your Honor however to rule first on the motion to suppress, and then take up the matter of trial, which would in effect be a stipulation as to what you have already heard, just to separate out the two entities.

The Court: Well, I'm prepared to rule on the motion. It just occurred to me that this would be an expeditious way of handling the matter, and apparently you two came to the same conclusion.

So far as the motion is concerned, do either one of you want to be heard?

[Arguments on the motion to suppress were stenographically recorded, but are not transcribed herein.]

The Court: I don't view these things quite the same way that you apparently do, and I think that Courts are required—indeed, I think many of the decisions require the Courts, by what they say to judge of these things in the light of what a reasonable officer would do under like circumstances and not as judges and lawyers would do in a courtroom later on viewing it dispassionately and calmly, and I think if I were a [63] police officer out there on the street, and I was refused a registration or a rental agreement which I asked for, and the man wanted to take off, I would immediately suspect that I had a felon of my hands, and I don't think this is unreasonable even under the Fourth Amendment to the Constitution, and if you think so, and the Court of Appeals agrees with you, then I shall be reversed, because I don't follow you on the law.

Mr. Fineman: I'm sure Your Honor understands the points that I have been trying to make, and——

The Court: I think I do.

Mr. Fineman: I think Your Honor does, and that's all anyone can ask for is the consideration.

THE COURT: Yes. I think I understand it, and I see your reasoning, but I just don't agree with it.

MR. FLEGAL: That's happened before, Your Honor.

THE COURT: Listen, I dare say, not too often, but it has happened that I have been reversed, and I dare say it shall happen again. I don't seek reversals, but I must call the law as I think I see it. I think I understand your proposition, and very frankly I don't agree with it.

MR. FLEGAL: I appreciate that, sir.

THE COURT: All right, sir.

I may say further, Mr. Flegal, that when you asked the officer if he had refused to show you that rental agreement would you have allowed him to leave, how easy it would have been [64] for the officers, if they were trying to cover up something, to have said yes, if he had said no, I would have let him go.

MR. FLEGAL: That's frequently——

THE COURT: I think these officers were quite honest in what they said and did, and I frankly at this point don't see anything that's illegal or unconstitutional about their actions.

Now, you in your stipulation said you wanted to object as to the test firing. I don't quite understand what you mean by that.

MR. FLEGAL: What we're trying to do, Your Honor, is just to be very sure that we don't run into that buzz saw that happened several years ago in the Court of Appeals when testimony as to a gun comes in any other way, and they say they don't have to reach the suppression hearing the defendant is raising.

THE COURT: There was testimony in this case, by Officer Morrissette, that he was present and saw the gun test-fired.

MR. FLEGAL: Correct. Correct. And what we are prepared to stipulate is that the officers' testimony, that is Officer Busker, and Officer Morrissette, may be considered by Your Honor at trial just as they gave it at the motion to suppress without being repeated, and then that we now object to all testimony relating to the gun allegedly taken from the [65] defendant's vehicle on January 16th for the reasons set forth in our motion to suppress, and as adduced at the hearing.

THE COURT: Well, on that basis I will overrule your motion.

Mr. Fineman: Fine. And our objection.

The Court: Any deny the suppression motion. Where do we go from here, gentlemen?

Mr. King: I think perhaps we announce the case, and then——

The Court: Well, is there more testimony to be put on beyond what I have heard on the case as a whole?

Mr. King: No, Your Honor.

The Court: Does the defendant wish to put on any testimony beyond what he has put on?

Mr. Finegal: No, Your Honor.

Excuse me, I want to make it very clear the defendant hasn't put on any testimony in trial.

The Court: I understand that.

Mr. Finegal: Right.

The Court: But I mean assuming that he has, that I'm not regarding what he said as testimony, and I am not regarding what his witness said as testimony. You are standing on the government's case, and on your motion for a finding for the defendant at the end of the government's case?

Mr. Finegal: Correct, Your Honor. And, of course, on [66] our evidentiary objection which we've technically made for the record, and your——

The Court: Yes. I understand that.

Mr. King: And, of course, the government would formally wish to move into evidence the gun, and the clip.

The Court: All right. Now, I take it your objection to the receipt of those in evidence is the same objection you made before, sir?

Mr. Finegal: Same objection. We object on the grounds set forth on our motion to suppress and adduced at the hearing.

* * *

[69] Mr. King: The stipulation does provide, I think, Your Honor, that the defendant was not licensed to carry a gun, and the gun was test fired. I believe that's what it says.

Mr. Finegal: It does, Your Honor.

The Court: Yes. Well, the stipulation will be filed in the case.

I take it there's no objection to that?

Mr. Fineman: Oh, no. In fact, I think it should be, [70] Your Honor.

THE COURT: And the objections to Government Exhibit's 2 and 2-A will be overruled, and they will be admitted.

[Government's Exhibits No's. 2, and 2-A, previously marked for identification, were received in evidence.]

MR. KING: Very well, Your Honor.

THE COURT: Now, is there anything further that anybody wants to submit or to say about the case in chief?

MR. KING: No, Your Honor. At this point the Government rests.

THE COURT: Mr. Flegal.

MR. FLEGAL: At this point, Your Honor, the defendant stands on his pretrial motion, and his trial objections, and the defendant will also rest.

MR. KING: Your Honor, just one other point. With respect to this stipulation, since it amounts to a stipulation by the defendant of essentially all his case, which is very similar, although——

THE COURT: The what case?

MR. KING: It's essentially all his case, and I wonder if Your Honor would direct questions to the defendant inquiring of him whether he fully understands, for the record, the significance of this stipulation. This is very similar to the case wherein the U. S. Court of Appeals recently—there was a stipulation as to testimony, and then the sole issue [71] at trial was an insanity defense. The Court of Appeals reversed on the ground that the Court had not addressed itself directly to the defendant and inquired of him if he fully understood the nature of the stipulation, and what rights, and what have you, that he was giving up as a result of that stipulation.

THE COURT: And you say that had to do with a stipulation?

MR. KING: Yes. In that case it was a stipulation. They analogized it to a guilty plea. They said it wasn't exactly the same.

THE COURT: Was this the United States Court of Appeals?

MR. KING: Yes, Your Honor.

THE COURT: I thought so.

MR. FLEGAL: Your Honor, I wanted to make it clear, I will be happy to have Your Honor do that, because I dis-

cussed this at length with Mr. Palmore yesterday, but, of course, we are not stipulating the whole case; we're merely stipulating the testimony.

THE COURT: I understand.

MR. KING: And I simply want to be sure that the record is clear.

THE COURT: Out of an abundance of caution, although I have much more confidence in the District of Columbia Court of [72] Appeals, I will ask the defendant.

MR. FLEGAL: Could I assist Your Honor perhaps on that, since I know what happened, and ask him a few preliminary questions?

THE COURT: I have no objection.

MR. FLEGAL: Mr. Palmore, yesterday you recall discussing with me the preparations for the trial today?

MR. PALMORE: No.

MR. FLEGAL: Do you remember having a conference with Mr. Best and me yesterday for about an hour and a half? Mr. Best is an attorney in my office.

THE COURT: Mr. Palmore, suppose you come up here where I can hear you better. You may assume, Mr. Palmore, that you're still under oath to tell the truth.

MR. FLEGAL: And do you recall during that conference, Mr. Palmore, that we discussed at some length the proposed stipulation that we would file here concerning a waiver of your trial by a jury and the legal issue of the illegal search that we were going to submit to the judge?

MR. PALMORE: Yes.

MR. FLEGAL: Did we discuss that in full?

MR. PALMORE: Yes.

MR. FLEGAL: Do you understand what we have done in that?

MR. PALMORE: Yes, I do.

[73] MR. FLEGAL: Okay. You understand that technically we have the right to call the officers back to the witness stand to make them repeat their testimony before Judge Korman?

MR. PALMORE: Yes.

MR. FLEGAL: All right. And that we have proposed a stipulation they need not repeat that testimony, but that Judge Korman may consider the testimony they gave this morning during the motion, and this afternoon during the motion, just as if it was trial testimony?

MR. PALMORE: Yes.

MR. FLEGAL: All right. And you understand that we are further proposing to stipulate that on January 16th you did not have a license to carry a gun?

MR. PALMORE: Yes.

MR. FLEGAL: And you understand that we're further stipulating, again subject to our constitutional argument, legal search issue, that the gun which the officers say they found worked?

MR. PALMORE: Yes.

MR. FLEGAL: All right. Do you have any questions about those?

MR. PALMORE: No.

THE COURT: All right. And you have discussed all of this with your attorney?

MR. PALMORE: Yes, Your Honor.

[74] THE COURT: And you are perfectly satisfied that he is a good attorney?

MR. PALMORE: Yes.

THE COURT: And you are satisfied with the advice he's given you?

MR. PALMORE: Yes.

THE COURT: I would like to add to the record that I think he's a good attorney too.

You can step down, sir.

MR. FLEGAL: The defense rests, Your Honor.

THE COURT: All right.

Well, I have no difficulty in arriving at a conclusion as to the defendant's guilt, because having admitted the gun in evidence, and by virtue of the stipulation that he had no permit to carry it, and by virtue of my view of the law that the gun was properly seized by the officers, it seems to me that the charge laid against the defendant has been made out in totality in the light of those findings and conclusions, so accordingly I find the defendant guilty of the charge laid in the indictment, which is thereon or about January 16, 1971, within the District of Columbia, the defendant carried, either openly or concealed, on or about his person, and not in his dwelling house, and not in a place of business of his, and not on other land possessed by him, a dangerous weapon capable of being so concealed; namely, a pistol, and that he had no [75] license therefor issued as provided by law.

I don't anticipate that you will argue that the street is land owned partially by him?

Mr. Fraser. No such contention. I have made many others, but not that one.

* * *

[Caption Omitted]

STIPULATION

The parties stipulate as follows:

1. Trial by jury having been waived, the Court may consider the testimony of Officer Busker and Officer Morrissette given at the hearing on defendant's motion to suppress evidence as if such testimony had been repeated at trial subject, however, to defendant's right to object to such testimony on the grounds set forth in the motion to suppress evidence and/or advanced at the hearing thereon.

2. Subject to defendant's right to object as aforesaid, the gun which the officers testify was taken from the automobile being operated by defendant on January 16, 1971 was subsequently test fired and it fired one round.

3. On January 16, 1971, defendant did not have a permit or license to carry a gun in the District of Columbia.

/s/ Warren R. King
WARREN R. KING
Assistant United States Attorney

/s/ Frank F. Flegal
FRANK F. FLEGAL
Attorney for Defendant

APPROVED:
/s/ Korman, J.
Judge
[filed in open court 3/30/71]

Judgment

April 27, 1971

Judge Korman

2-6 years. Defendant will serve 6 months. Execution of remainder of sentence suspended. Probation six (6) years. Defendant committed w/o bond pending appeal.

[Caption Omitted]

Notice of Appeal

Notice is hereby given that Roosevelt F. Palmore, the defendant herein, appeals to The District of Columbia Court of Appeals from the judgment of conviction of this court entered on the 27th day of April, 1971.

[Signature omitted]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued October 19, 1971 Decided April 28, 1972)

[Judgment entered this date]

Frank F. Flegal for appellant.

James A. Adams, Assistant United States Attorney, with whom *Thomas A. Flannery*, United States Attorney, *John A. Terry* and *Warren R. King*, Assistant United States Attorneys, were on the brief, for appellee.

Before KELLY, KERN and NEBEKER, Associate Judges.

KERN, *Associate Judge:* Appellant was tried and convicted in the Superior Court of the District of Columbia of a "local" felony, that is, carrying a dangerous weapon (a pistol), after having sustained a prior felony conviction, D.C. Code 1967, § 22-3204.[1] He contests the jurisdiction of the Superior Court to hear his case[2] because he alleges that only a federal court created under article III of the Constitution has jurisdiction over a felony proscribed by

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[1] The full facts of this case are set forth in Part II of the opinion

[2] The "District of Columbia Court Reform and Criminal Procedure Act of 1970," Pub. L. No. 91-358, 84 Stat. 475 (1970) vests jurisdiction in the Superior Court of the District of Columbia over criminal cases under any law applicable exclusively to the District. Such jurisdiction vests in two stages over an eighteen month period, commencing with the effective date of the Act, 84 Stat. 486, D.C. Code 1967, § 11-923 (Supp. IV, 1971). The Act vests in this court jurisdiction over the appeals from all final orders and judgments of the Superior Court, 84 Stat. 480, D.C. Code 1967, § 11-721 (Supp. IV, 1971). Under the Act, the Superior Court and this court receive their judicial power from Congress pursuant to article I of the Constitution, 84 Stat. 475, D.C. Code 1967, § 11-101(2) (Supp. IV, 1971). The Court Reform Act further provides that the judges of the Superior Court and this court shall be subject to tenure, salary, and removal provisions which are not within the confines of article III (see note 3, *infra*), 84 Stat. 491, D.C. Code 1967, § 11-1502 (Supp. IV, 1971); 84 Stat. 479, 488, D.C. Code 1967, §§ 11-703, 904 (Supp. IV, 1971); 84 Stat. 488, D.C. Code 1967, § 11-1521 (Supp. IV, 1971).

Congress and prosecuted in the name of the United States. Appellant also launches an attack upon the validity of (1) a search of and seizure from his automobile, and (2) a decision by the Government to prosecute him under one statute rather than another. After a review of each of his contentions, which have been ably and vigorously presented in briefs and supplemental memoranda submitted at our request after oral argument, we *affirm* his conviction.

I.

Appellant bases his formidable challenge to the jurisdiction of the Superior Court and this court upon the language of article III which states that the judicial power of the United States shall extend to all cases arising under the laws of the United States and to which the United States is a party.[3] He points out (a) that the sections of the D.C. Code, despite being applicable only to the District of Columbia, constitute the "Laws of the United States," *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1, 9 (1889) (dictum); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (dictum), and (b) that the United States is a party to any case in which it prosecutes an individual for a violation of the D.C. Code.

Appellant contends that when a case or controversy, such as his, falls within the "judicial Power of the United States," as defined in article III, Congress cannot constitutionally confer jurisdiction over that case upon a non-article III court. He acknowledges that Congress has created under article IV[4] courts without life tenure for their members to sit in the federal territories and that

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[3] U.S. Const., art. III reads in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . .

[4] U.S. Const., art. IV, § 3, cl. 2 reads in pertinent part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

these courts do have jurisdiction over cases and controversies arising under the laws of the United States and to which the United States is a party. *O'Donoghue v. United States*, 289 U.S. 516 (1933); *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); *United States v. Montanez*, 371 F.2d 79 (2d Cir.), *cert denied*, 389 U.S. 884 (1967). However, he relies upon the fact that the Supreme Court has emphatically recognized the significant constitutional distinction between territorial courts and the District of Columbia courts. *O'Donoghue v. United States, supra at* 538.[8]

In further support of his argument,[9] appellant notes that individuals charged with violations of "local" felonies in the District have been tried by federal courts created under article III, at least since 1863, when the predecessor of the present United States District Court for the District of Columbia was created by Congress.[10]

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[8] The Government contends (a) that the distinction drawn by the decision in O'Donoghue v. United States, 289 U.S. 516 (1933) (which we discuss fully in n.15, *infra*), may no longer be sound, and (b) that Congress should be given the same freedom in fashioning local District courts under article I as it has enjoyed in creating the territorial judicial systems under article IV. The Government argues that, as is true with respect to the territories, (i) Congress does have plenary legislative power over the District, a specific geographic area; and, (ii) the area may someday become a state (or enjoy such local control that it is able to act independently of Congress) capable of creating its own judicial system so as no longer to be in need of a large number of lifetime article III judges whose principle function had been to adjudicate local matters, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543-48 (1962).

Notwithstanding a certain appeal of the Government's position, this court is, of course, still bound by the Supreme Court's decision in *O'Donoghue*, which unambiguously rejected the notion that Congress could exercise the same power over the courts of the District as it does with respect to the territorial judicial systems.

[9] *See also* Note, *Legislative and Constitutional Courts*, 71 YALE L. J. 979, 1010-11 (1962); and Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 COLUM. L. REV. 122, 154 (n. 149) (1962), which take the position that as to D.C. felonies, there appears to be no justification for avoiding the provisions of article III guaranteeing lifetime judges and undiminishable salary, especially in view of the close proximity between the Congress and the local courts.

[10] From 1801 until 1863, exclusive jurisdiction over local felonies committed in the District was vested by Congress in the circuit court of the District of Columbia (and the chief circuit judge sitting as a district judge) which was the only existing court of either general or federal jurisdiction in the District. The judges of the circuit court exercised the same powers, and

We believe that neither case law nor history and logic support appellant's argument that Congress *must* vest jurisdiction over local felonies *only* in article III courts. We conclude that Congress, in the exercise of its plenary power under article I,[8] has the constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine these particular criminal cases within the District.

We begin with the established proposition that Congress, at least with respect to courts in the District, is enabled by the District Clause (U.S. CONST., art. I, § 8, cl. 17) to confer a "judicial power," wholly separate and apart from its authority under article III to confer judicial power on inferior federal courts. *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949);[9]

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enjoyed the same salary and tenure, as did the circuit judges sitting on inferior federal courts created by virtue of article III in the several states, 2 Stat. 103-06 (1801); 2 Stat. 155, 166 (1802).

In 1838, Congress created the criminal court of the District of Columbia which assumed the jurisdiction over all criminal offenses committed in the District which had been vested in the circuit court. The judge on the criminal court did not enjoy the same salary as judges on the inferior federal courts nor did the statute specify (as did the statute creating the circuit court), whether this judge enjoyed the tenure of inferior federal court judges, 5 Stat. 306 (1838). *Compare* 2 Stat. 660 (1811) and 3 Stat. 457 (1813).

The criminal court was abolished in 1863 and its jurisdiction was transferred to the newly created supreme court of the District of Columbia which also enjoyed the same powers as federal district courts created under article III in the several states, 12 Stat. 762, 763 (1863). It was not until 1933, however, that the Supreme Court decided that the supreme court of the District of Columbia was created by Congress by virtue of article III, O'Donoghue v. United States, *supra*. *See generally* Glidden Co. v. Zdanok, *supra* at 539, and the briefs submitted by the Solicitor General (at 41), and by Roger Robb, (now a judge of our federal Circuit Court), amicus curiae (at 30 *et seq.*) in the latter case.

[8] U.S. CONST., art. I, § 8, cl. 17 reads in pertinent part:

> The Congress shall have power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

[9] Although the four separate opinions filed in *Tidewater* each expressed a different view as to the power of Congress under the District Clause to clothe inferior federal courts in the several states with jurisdiction over matters outside of article III, each opinion did concede that Congress can confer some measure of judicial power under article I upon courts in the District of Columbia, Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337

Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838); *Lurk v. United States*, 111 U.S.App.D.C. 238, 296 F.2d 360 (1961), *aff'd on different grounds*, 370 U.S. 530 (1962); *Western Urn Manufacturing Co. v. American Pipe and Steel Corp.*, 109 U.S.App.D.C. 145, 284 F.2d 279 (1960), *sustained*, 113 U.S.App.D.C. 378, 308 F.2d 333 (1962); *Pang-Tsu Mow v. Republic of China*, 91 U.S.App.D.C. 324, 201 F.2d 195 (1952), *cert. denied*, 345 U.S. 925 (1953). Congress has not only utilized the District Clause to vest in article III courts here jurisdiction over cases and controversies *not arising under article III*, *e.g.*, *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co.*, *supra* (diversity jurisdiction outside of article III limitations); *Kendall v. United States*, *supra*, (common law mandamus); *Western Urn Manufacturing Co. v. American Pipe and Steel Corp.*, *supra* (suits between non-resident corporations); *Pang-Tsu Mow v. Republic of China*, *supra* (suits between aliens); but Congress has *also* employed the District Clause to permit non-article III judges to hear and determine local misdemeanors [10] and local felonies, *Lurk v. United States*, *supra*,[11]

U.S. 583, 591-92, 600; 608-09 (Butledge, J., concurring); 641, 643 (Vinson, J., dissenting); 655 (Frankfurter, J., dissenting) (by inference).

See also the remarks by Mr. Justice Frankfurter at the oral argument in Glidden Co. v. Zdanok, *supra*, with regard to the power of Congress to vest jurisdiction over local felonies in non-article III courts in the District of Columbia, 30 U.S.L.W. 3261-63 (1962).

[10] Appellant concedes that the power to hear cases involving misdemeanor violations of the D.C. Code has been constitutionally vested by Congress in local courts not created by virtue of article III whose judges have always served for a period of years with compensation unequal to that received by judges on inferior federal courts. This includes the justices of the peace who had jurisdiction over local misdemeanors prior to the creation of the police court in 1870 (16 Stat. 153) and continuing on through to the judges of the municipal court who received the police court jurisdiction in 1942 (56 Stat. 196) until the predecessor of the present Superior Court, the Court of General Sessions, received this jurisdiction in 1963 (77 Stat. 487). The Supreme Court's reference in Callan v. Wilson, 127 U.S. 540 (1888) to the article III right to criminal jury trial before a local justice of the peace court has not been interpreted as a recognition of article III status of that court, but rather, that the fifth and sixth amendment rights to due process of law and criminal jury trial are applicable to all criminal trials in the District of Columbia, *see* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., *supra* at 650 n.14 (Butledge, J., concurring); Neild v. District of Columbia, 71 App. D.C. 306, 316 n.19, 110 F.2d 246, 256 n.19 (1940).

[11] Contrary to appellant's contention, the author of the majority opinion in Glidden Co. v. Zdanok, *supra* at 537, 549, Mr. Justice Harlan, did not intend to repudiate the holding of the Circuit Court in Lurk v. United States,

Bradford v. Green, Civil Action No. 3527-70 (D.D.C. 1971), *aff'd on other grounds*, 142 U.S.App.D.C. 237, 440 F.2d 265 (1971). If Congress, within the District, can *constitutionally* vest a species of judicial power upon District courts free of the limitations contained in article III, then it follows that Congress, in the exercise of its "necessary and proper powers" under U.S. CONST., art I, § 8, cl. 18, is entitled to fashion an entire court system, free of the tenure and salary limitations imposed by article III, to receive this same judicial power over "local" crimes and civil cases.

There may be, of course, substantial and persuasive reasons for creating all courts in the District with lifetime tenure and undiminishable salary for judges so as to be completely free of possible legislative influence. *See generally O'Donoghue v. United States*, *supra* at 531-33; *Evans v. Gore*, 253 U.S. 245, 253 (1920); *Legislative and Constitutional Courts*, 71 YALE L.J., *supra* at 1010-11; *The Distinction Between Legislative and Constitutional Courts*, 62 COLUM. L. REV., *supra* at 154 n. 149. However, Congress has chosen in its legislative wisdom to follow the example of numerous states [12] which do not provide for such tenure or salary, and we find this choice to be a legitimate means by which Congress may accomplish the permissible end of creating a "local" court system under the District Clause, *United States v. Jacobs*, 306 U.S. 363, 371 (1939); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Neild v. District of Columbia*, 71 App.D.C. 306, 312, 110 F.2d 246, 252 (1940).

We next consider appellant's historical argument: That in the District of Columbia, Congress, at least since 1963,[13] has conferred jurisdiction over local felonies in article III courts and therefore it cannot *now* be permitted to withdraw that jurisdiction from these courts and vest it in an article I court system.

First, it is by no means clear that when Congress vested

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111 U.S.App.D.C. 338, 296 F.2d 360 (1961). Justice Harlan's scholarly opinion amply confirms the results of the inquiry which he made of the Solicitor General at the oral argument: That the principle upon which the Circuit Court based its holding would not serve as a single means for deciding both the *Lurk* case involving a D.C. felony and the *Glidden* case involving a New York diversity suit, 370 U.S. at 538. *See also* 30 U.S.L.W. 3263 (1962).

[12] Forty-six state constitutions do not provide for life tenure for trial judges who hear and determine state felony cases, Appellee's Supp. Memo. 9-11.

[13] *See* note 7, *supra*.

jurisdiction over *local* felonies in the courts of the District of Columbia, it did so because those cases arose "under the laws of the United States" within the meaning of article III. Of course, these local crimes were violations of laws of the United States, i.e., Acts of Congress, but, were they the types of cases arising under "the Laws of the United States" over which article III directs Congress to vest jurisdiction in inferior *federal* courts?" The historical record is, for all practical purposes, silent as to the particular constitutional power Congress thought it was exercising when it created the first courts in the District and conferred jurisdiction upon them. We must therefore turn to the *type of jurisdiction* conferred by Congress to determine which article of the Constitution Congress may have relied upon to confer that jurisdiction. *See generally Ex parte Bakelite Corp.*, 279 U.S. 438, 459 (1929).

In 1801, Congress created the first District of Columbia felonies when it reenacted for the District of Columbia the laws which had been applicable to those particular areas of Maryland and Virginia ceded to the United States for the District, 2 Stat. 103, 104 (1801); *see Kendall v. United States, supra* at 619. It seems quite unlikely that Congress intended to transform the offenses committed by the residents of the ceded areas against their local statutes into general federal offenses triable under article III in lower federal courts. To have done so would have been to create a unique form of federal criminal jurisdiction because (i) the conduct proscribed by Congress in the District of Columbia Code, unlike general federal offenses, could have occurred only in one specific geographical area, and (ii) inferior federal courts created under article III to sit throughout the several states have never been capable of

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[illegible] Appellant contends that the "judicial Power of the United States," as defined in article III, must extend to all cases arising under the laws of the United States. We disagree. Quite clearly, judges in the state courts, as well as judges who derive their sole power from article I (*e.g.*, D.C. misdemeanors and cases and controversies before "legislative courts," see Burns, Inc. v. Commissioner, 57 T. C. No. 30, at 8 (1971)) and article IV (territorial) judges have heard and determined cases arising under the laws of the United States since the very earliest days of our history. *See generally* Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., *supra* at 618 (Rutledge, J., concurring).

exercising article III judicial power over local offenses committed in their respective districts.[18]

It must be remembered that in 1801, there was a distrust of the general federal judicial power. Indeed, this distrust had (a) led to the provision in article III itself that Congress might limit that judicial power almost completely, *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra* at 634 (Vinson, J., dissenting), and, (b) engendered the notion that judicial power under article III should be expanded only when it could be demonstrated that the particular type of jurisdiction was acutely needed for the purposes of *uniformity* and *national harmony, id.* In sum, we are persuaded that by virtue of the restricted locale of the conduct proscribed by the first District of Columbia Code, the fact that inferior article III courts throughout the several states are incapable of receiving jurisdiction over purely local offenses and the general reluctance in the early days of our nation's history to *expand* the article III judicial power, Congress conveyed the judicial power over District of Columbia felonies to the courts in the District under the *District Clause. See generally National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra; Pang-Tsu Mow v. Republic of China, supra; Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Lurk v. United States, supra.*

Even if we were to assume that Congress could have vested *under article III* jurisdiction over what were in 1801 purely local felonies in the courts then existing in the District, the plain language of article III would apparently

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[18] In O'Donoghue v. United States, *supra*, Justice Sutherland justified his conclusion that the local supreme court and circuit court of appeals were article III courts primarily because they exercised parallel jurisdiction with the other inferior *federal* courts in the several states. He stated that the exercise of non-federal or administrative and legislative powers by the local courts by virtue of the District Clause should not deprive those courts of their article III status, 289 U.S. 545. What we infer from the learned Justice's opinion is that the exercise of those powers, which other inferior federal courts cannot exercise (including the power to hear local felonies), must have derived solely from the District Clause. Otherwise, Justice Sutherland surely would have alluded to the jurisdiction over local felonies (which have never been considered as general federal offenses, Gilstrap v. Clemmer, 284 F.2d 304, 308 (4th Cir. 1960) as yet another reason why the local supreme court and circuit court were created by virtue of article III.

not prevent Congress from removing that jurisdiction.[16] We note that the Supreme Court has recognized that "legislative courts," under certain circumstances, are permitted to hear cases involving the same subject matter as those heard by article III courts. *National Mutual Insurance Co. of D.C. v. Tidewater Transfer Co., supra* at 600, 602 and 641 (Vinson, J., dissenting). *See also Burns, Stix Friedman & Co., Inc. v. Commissioner*, 57 T.C. No. 39 (1971). Thus, we see no reason why Congress could not have allowed *both* article III *and* article I courts in the District to hear D.C. felonies, or simply have decided (as it has done in enacting the 1970 Court Reform Act) that the article I court system should be the exclusive judicial forum in the District for such cases.

Concededly, Congress exercises its exclusive legislative power over the District subject *always* to the guaranties of the Bill of Rights[17] and other specific constitutional provisions. However, appellant has not demonstrated that he has any right emanating from article III to be tried for a *local* felony in the District of Columbia before an *article III* judge with lifetime tenure and undiminishable salary because the power of the United States Government to prohibit his conduct and to prosecute him for it *in an appropriate judicial forum* is not based upon the provisions of that article. What Congress has done by enacting the 1970 Court Reform Act is to treat criminal offenders in the District of Columbia as they would be treated in any state (or as they would have been treated if portions of Maryland and Virginia had never been ceded to the United States for the District of Columbia): If the conduct violates a local statute, a local court has jurisdiction to hear and determine their case; if the conduct violates a general federal statute, an article III federal court will have jurisdiction. We find no constitutional error on the part

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[16] *See* Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., *supra* at 600, 607 (Rutledge, J., concurring), 627 (Vinson, J., dissenting), 636 (Frankfurter, J., dissenting); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

[17] Indeed, many of the provisions of the Bill of Rights were applied directly to cases in the District of Columbia long before they were made applicable to the states through the fourteenth amendment, *see, e.g.*, Nalle v. District of Columbia, *supra* at 310 n.12.

of Congress in creating the District of Columbia Superior Court and this court to hear and determine "local" crimes.

II.

We turn now the facts of this case. Appellant contends that the trial court should have excluded from evidence the pistol which he was found guilty of possessing because the police seized it from his automobile in violation of his fourth amendment rights.

Officers Busker and Morrissette of the Special Operations Division of the Metropolitan Police Department were in plain clothes and an unmarked police car parked on "T" Street when appellant drove by in the early evening of January 16, 1971. Officer Busker knew from the Virginia license tags on appellant's car that the vehicle had been rented.[10] They decided to run a so-called "spot check" to determine if the appellant had a proper license and rental agreement (the equivalent of proper registration). Appellant had committed no moving traffic violation and his auto had no apparent equipment defect.

The officers followed appellant's car as it made an acute angle left turn from "T" Street onto Florida Avenue and then proceeded northwest on Florida for a few blocks until the officers waved appellant to a stop near the corner of Florida and Vermont Avenues. Appellant alighted immediately and met Officer Busker near the left rear area of his car, while the other officer proceeded to the right front area of the auto. Officer Busker asked for and received from appellant his driver's license. However, when asked for the rental agreement for the vehicle, appellant entered the car and retrieved it from the glove compartment. The agreement by its terms had expired on the previous Tuesday, January 12th. Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period.

During this conversation between Officer Busker and

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[10] Officer Busker testified that the numbers on the license tags of rental cars registered in Virginia ran in specified series. This was not contradicted by appellant at trial. (R.14.)

appellant on the left side of the car, Officer Morrissette was glancing at the interior of the vehicle by means of a flashlight." He testified at trial that his presence in that position and his use of the flashlight were standard operating procedure to protect the safety of the other officer who was endangered by the possibility that the driver, retrieving something from his car, might pull out a weapon and assault the officers. (R.59). Officer Morrissette then noticed the trigger mechanism of a pistol protruding out from beneath the armrest on the front of appellant's car. He removed the pistol from appellant's auto and, after learning that it was unregistered, placed appellant under arrest for a violation of D.C. Code 1967, § 22-3204."

The narrow issue posed is whether the officers could properly pull appellant over to the curb and demand his license and registration when (1) they had not seen him violate traffic or vehicular equipment regulations and (2) they had no cause to believe from his actions that he had otherwise engaged or was about to engage in any criminal activity. Appellant argues vigorously that when the officers stopped him by a show of their police authority they had "seized" him within the meaning and protection of the fourth amendment, yet they were not then able, as required by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

In reply, the Government contends that there is a right, indeed, a duty mandated by Congress,[3] on the part of a po-

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[1] Appellant's testimony, which was disbelieved at trial, was that Officer Morrissette began an immediate and thorough search of the interior of the car and the trunk as soon as appellant began conversing with Officer Busker. (R. 11-15.)

[2] Appellant alleged at trial that upon finding the weapon in the car after a thorough search of its interior, Officer Morrissette stated, "I told you that a rental car is a good case." (R. 15.) Officer Morrissette denied making such a statement. Under cross-examination, Officer Busker did state that he knew that many rented cars were not returned on time and that he personally knew of a policeman who stopped a rented car and found about $6,000 worth of narcotics in the vehicle. (R.37.)

[3] D.C. Code 1967, § 40-104(a) provides in pertinent part:

It shall be unlawful—

(1) for any person to operate any motor vehicle . . . upon any public highway of the District of Columbia . . . if such motor vehicle . . . is

officer to stop an automobile and require the driver to produce his license and the vehicle's registration without the need of first having reasonable suspicion that the driver lacks these particular documents. We believe that the propositions advanced by the parties are not necessarily irreconcilable within the general framework of the stopping of an automobile by police. We conclude that in this case the trial court's denial of appellant's motion to suppress was correct.

At the outset, we reject the rigid rule which appellant urges us to adopt: That a police officer may stop an automobile for a spot check of the driver's license and the car's registration *only* when he has articulable suspicion, as defined by *Terry*, that either of such documents is invalid. The touchstone of the fourth amendment is reasonableness. It seems to us in this age of the motor car that when the community's interest in limiting use of its highways to licensed drivers in registered autos is balanced against the momentary interruption of the motorist which is necessary to ascertain whether he is complying with these licensing requirements such intrusion is *not* so unreasonable as to be violative of the fourth amendment.[22]

We must keep in mind that if we were to limit the police,

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not registered . . . or . . . if such person does not have in his possession or in the motor vehicle . . . operated the registration certificate. . . .

D.C. Code 1967, § 40-301(c) provides:

Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor. . . .

See Mincy v. District of Columbia, D.C.App., 218 A.2d 507 (1966).

[22] Mincy v. District of Columbia, *supra* (and the cases cited therein at 218 A.2d at 508 n.3); United States v. Cross, 437 F.2d 385 (5th Cir. 1971); Myricks v. United States, 370 F.2d 901 (5th Cir.), *cert. dismissed*, 386 U.S. 1015 (1967); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); United States v. Vanguilder, 297 F.Supp. 71 (Md. 1969); United States v. Thomas, 289 F.Supp. 364 (S.D.N.Y. 1968); People v. Andrews, —— Colo. ——, 484 P.2d 1207 (1971); People v. Goldstein, 60 Misc.2d 745, 304 N.Y.S.2d 106 (1969); State v. Valstad, 282 Minn. 201, 165 N.W.2d 19 (1969); People v. Washburn, 265 Cal.App.2d 665, 71 Cal. Rptr. 577 (1968); People v. Nunn, 264 Cal.App.2d 719, 70 Cal. Rptr. 869 (1968); People v. Harr, 93 Ill.2d 146, 235 N.E.2d 1 (1968); State v. Kabayama, 99 N.J.Super. 85, 236 A.2d 164 (1967), aff'd, 52 N.J. 507, 246 A.2d 714 (1968).

Cf. Brinegar v. United States, 338 U.S. 160, 188 (Jackson, J., dissenting), reh. denied, 338 U.S. 839 (1949); Bowling v. United States, 122 U.S.App.D.C. 38, 350 F.2d 1002 (1965).

as appellant urges, to stopping *only* those autos in which the driver might reasonably be suspected to be without a license, for example, because of his youthful appearance, the result would unjustifiably single out and discriminate against certain groups of citizens, *i.e.*, the young. Moreover, such a restrictive ruling by us might render virtually unenforceable the Congressional prohibition against *all* unlicensed drivers and unregistered cars driving on District of Columbia streets.[13] After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus, they would be immune from the "spot check" to enforce a requirement deemed necessary by Congress for public safety on the District's highways.

We hasten to add that the courts, including ours, have warned law enforcement officers, specifically and emphatically, that a so-called "spot check" is *not* to be "used as a substitute for a search for evidence of some possible crime unrelated to possession of a driver's permit." *Mincy v. District of Columbia*, D.C.App., 218 A.2d 507, 508 (1966), (and the cases cited at 508 n.3). We say again that when the driver has produced his permit and registration and they are in order he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning. *See generally Lowe v. United States*, 407 F.2d 1391, 1395 (9th Cir. 1969); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161-72 (1966). It is at this precise point that the Supreme Court's explications in *Terry*, with regard to the reasonableness of police conduct in this area of police-citizen contact on the streets, come into play.[14] Once the check for the driver's

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[13] *Mincy v. District of Columbia*, *supra* at 508; *Lipton v. United States*, *supra* at 901; *Myricks v. United States*, *supra* at 904; *People v. Andrews*, *supra*; *People v. Nunn*, *supra*.

[14] Of course, *Terry* does come into play even before the initial stop if there is evidence that the officer's original reason in stopping the vehicle was to investigate some criminal behavior unrelated to the possession of a valid license and valid registration. A significant body of case law has developed the proposition that an officer may detain the driver of a vehicle upon less than probable cause if he has articulable suspicion that the person detained is presently engaged in or about to engage in or has just engaged in criminal activity. *See* United States v. Nicholas, 448 F.2d 622, 626 (8th Cir. 1971);

documents is completed by the officers, they may *not* continue detaining him on the spot unless they *then at that moment* have articulable suspicion that the driver is engaging or has engaged in criminal activity."

We hold in the instant case that the officers had the authority, without observing appellant violate a traffic regulation or otherwise engage in unlawful activity, to stop appellant for the sole purpose of asking him for his driving permit and auto rental agreement. Ordinarily, if he had produced these two documents in proper order the police would have been required to permit him to continue driving on his way without any further questioning. However, since he showed them a rental agreement which had apparently expired, they then had sufficient facts from which they might reasonably infer that he was in unauthorized possession of the car he was driving. Therefore, they were entitled to detain him until the rightful ownership and use of that car could be clarified.

United States v. Madril, 445 F.2d 827, 828 (9th Cir. 1971); United States v. Johnson, 142 U.S.App.D.C. 215, 219-20, 442 F.2d 1239, 1243-44 (1971); United States v. Turner, 442 F.2d 1146, 1148 (8th Cir. 1971); United States v. Harris, 436 F.2d 928, 932 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Young v. United States, 140 U.S.App.D.C. 333, 336, 435 F.2d 405, 408 (1970); United States v. Leyva-Barragan, 423 F.2d 669, 670 (9th Cir. 1970); Riccardi v. Perini, 417 F.2d 645, 647 (6th Cir. 1969); Bowling v. United States, *supra*; United States v. McIntyre, 304 F.Supp. 1244 (E.D. La. 1969); United States v. Gateway, 297 F.Supp. 67, 69-70 (N.D. Ga. 1969); State v. Dell, 258 La. 914, 249 So.2d 118 (1971); Gustafson v. State, 243 So.2d 615, 619-20 (Fla. Dist. Ct. App. 1971); State v. Smithers, 269 N.E.2d 874, 877-78 (Ind. 1971); State v. Woodford, 26 Ohio Misc. 51, 55-56, 269 N.E.2d 143, 147 (1971); Stone v. People, —— Colo. ——, 485 P.2d 495-98 (1971); State v. Ferguson, 3 Wash.App. 898, 479 P.2d 114 (1971); State v. Goudy, 52 Haw. 497, 479 P.2d 800 (1971); United States v. Frye, D.C.App., 271 A.2d 788, 790 (1970); State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (1970); People v. Nickles, 9 Cal.App.3d 468, 88 Cal. Rptr. 763 (1970); State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (1969); Sarabia v. State, 455 S.W.2d 231, 234 (Tex. Crim. App. 1969) (Onion, J., dissenting); State v. Lewis, 80 N.M. 274, 454 P.2d 360 (1969); People v. Villafuerte, 275 Cal.App.2d 531, 80 Cal. Rptr. 279 (1969); People v. Miesio, 103 Ill.App.2d 398, 243 N.E.2d 795 (1968); People v. Tassone, 41 Ill.2d 7, 241 N.E.2d 419, 421 (1968), *cert. denied*, 394 U.S. 965 (1969); People v. Harr, *supra*.

[*] Quite obviously at this point the "stop" has passed beyond the point of a minor intrusion for a public health and safety purpose (*i.e.*, the license and registration "spot check") and has passed into the realm of an investigation and interrogation focusing on a particular individual whose conduct in a motor vehicle reasonably suggests either a particular license or registration violation or the commission of an unrelated criminal offense.

In sum, the officers upon the instant facts and circumstances were properly positioned alongside the car at the moment one of them saw the pistol in plain view and seized it. Accordingly, there is no violation of the fourth amendment and the trial court correctly admitted the pistol into evidence against appellant at trial. *See Harris v. United States*, 390 U.S. 234, 236 (1968); *Wise v. United States*, D.C.App., 277 A.2d 476 (1971); *United States v. Johnson*, 142 U.S.App.D.C. 215, 442 F.2d 1239 (1971).

III.

Appellant's final contention is that the Government violated his fifth amendment right to equal protection of law by prosecuting him for having the pistol under the "felony-repeater" clause of D.C. Code 1967, § 22-3204 [*] rather than under the "first offender-misdemeanor" clause of D.C. Code 1967, § 22-3203(2).[**] He argues that since these two statutes prescribe different punishments for the identical conduct, to wit, possessing a pistol after having been convicted of a felony, his right to equal protection was denied when one rather than the other was chosen by the Government. *See Berra v. United States*, 351 U.S. 131, 139 (1956)

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[*] D.C. Code 1967, § 22-3204 provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215 [fine of not more than $1,000 or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (Emphasis added.)

[**] D.C. Code 1967, § 22-3203 provides in pertinent part:

> No person shall own or keep a pistol, or have a pistol in his possession or under his control, within the District of Columbia, if—
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> . . . .
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> (2) he has been convicted in the District of Columbia or elsewhere of a felony,
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> . . . .
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> Whoever violates this section shall be punished as provided in section 22-3215 [fine of not more than $1,000 or imprisonment for not more than one year, or both], unless the violation occurs after he has been convicted of a violation of this section, in which case he shall be imprisoned for not more than ten years. (Emphasis added.)

(Black, J., dissenting); Olsen v. Delmore, 48 Wash.2d 545, 295 P.2d 324 (1956); *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955).[*] We disagree.

First, the two statutes in question do *not* proscribe the identical conduct. On the one hand, Section 22-3203(2) makes it a misdemeanor for any *felon* to own or keep a pistol under his control *anywhere* and then goes on to provide a greatly increased penalty if the defendant has previously violated that said section. On the other hand, Section 22-3204 makes it a *misdemeanor* for *anyone* (not simply a felon) to possess on his person, except in his *dwelling house* or on other *land* possessed by him, an *unlicensed* pistol capable of being concealed. A defendant under this statute who has a prior felony conviction may receive up to ten years imprisonment for even a first violation. The prior felony conviction referred to in § 22-3204, unlike the felony provision in § 22-3203(2), is *not* an element of the offense. *Jackson v. United States*, 95 U.S.App.D.C.328, 221 F.2d 883 (1955).

Even if we were to *assume* that both Sections 22-3203(2) and 22-3204 were proscribing certain conduct *by felons*, these two statutes prohibit *differing* kinds of conduct. A felon possessing a pistol in his own home or on other land possessed by him would *not* violate the ban contained in Section 22-3204 against carrying a concealed weapon but would violate only the misdemeanor clause of Section 22-3203(2). In other words, the Government in order to prosecute a felon under the "felony-repeater" clause of Section 22-3204, must not only prove that the defendant was a felon who possessed or controlled a gun (the elements of the § 22-3203(2) misdemeanor), but, in addition, that

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[*] *See also* Dixon v. District of Columbia, 129 U.S.App.D.C. 341, 394 F.2d 966 (1968); Hamilton Nat'l Bank v. District of Columbia, 85 U.S.App.D.C. 109, 176 F.2d 694, *cert. denied*, 338 U.S. 891 (1949); People v. Utica Daws Drug Co., 16 App.Div.2d 12, 225 N.Y.S.2d 128 (1962), where equal protection was violated because irrational distinctions were made by the executive branch of the Government between persons whose conduct was identical within the meaning of the applicable statutes.

From the standpoint of constitutional theory, unequal punishment for the identical conduct may be considered as violative of *due process* (unconstitutional vagueness with regard to the applicable penalty for specified conduct) as well as equal protection (unconstitutional lack of reasonable classification with regard to penalties for offenders guilty of the identical conduct). Since appellant phrases his argument in terms of equal protection, our analysis in the instant case is also in those terms, although our conclusion would be the same if we were to consider his argument upon due process grounds.

the felon had an unlicensed pistol on his person while not in his dwelling or on other land owned by him. *See generally Bonanno v. United States*, 380 U.S. 343 (1968); *United States v. Coppola*, 250 F.Supp. 903, 300 F.Supp. 932 (Conn.), *aff'd*, 425 F.2d 660 (2d Cir. 1969).

Equal protection would be denied only if the violation of the misdemeanor clause of § 22-3203(2) invariably constituted a violation of the "felony-repeater" clause of § 22-3204, *see United States v. Coppola*, 425 F.2d at 661 (2d Cir. 1969). Furthermore, we are not dealing with two statutes which are even "functionally equivalent,"[*] because violations of §§ 22-3203(2) and 22-3204 are not susceptible to the identical proof. In sum, the situation presented by the statutes in this case is not at all uncommon.[**] Appellant's status as a felon who possessed an unlicensed pistol while not in his dwelling or on his land constituted an act that violated two different criminal statutes. Simply because the Government could have proven a violation by appellant of both §§ 22-3203(2) and 22-3204 and happened to choose § 22-3204 does not violate appellant's right to equal protection, *Newman v. United States*, 127 U.S.App.D.C. 263, 382 F.2d 479 (1967); *United States v. Coppola*, *supra*.

In addition, the fact that appellant *could* have been charged solely with a "first offender-misdemeanor" violation of § 22-3203(2) does not *entitle him* to be so charged, *Hutcherson v. United States*, 120 U.S.App.D.C. 274, 277, 345 F.2d 964, 967, *cert. denied*, 382 U.S. 894 (1965), since the prosecutor has authority to decide which charge to bring, including a determination on whether to charge appellant under the felony-repeater provisions of these statutes. *Newman v. United States*, *supra*; *Hutcherson v. United States*, *supra*; *Martin v. United States*, D.C.App., 265 A.2d 448 (1971); *United States v. Shaw*, D.C. App., 226 A.2d 906, 908 (1967).

The judgment must be and is

Affirmed.

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[*] In *Hutcherson v. United States*, 120 U.S.App.D.C. 274, 278, 345 F.2d 964, 968, *cert. denied*, 382 U.S. 894 (1965), the concurring opinion written by the now Mr. Chief Justice Burger referred to three different narcotics statutes which were "functionally equivalent" because unexplained possession of the drugs was sufficient to constitute a violation of each statute.

[**] E.g., a defendant may violate a felony statute when he commits armed robbery

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831 January Term, 1972

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES, APPELLEE.

9217-71

[Filed April 28, 1972]

Appeal from the Superior Court of the District of Columbia, CRIMINAL DIVISION.

BEFORE: Kelly, Kern and Nebeker, Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Superior Court of the District of Columbia, in this cause, be and the same is hereby, affirmed.

Per Curiam.
For the Court:

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS,
Clerk.

Dated: April 28, 1972.
Opinion per Associate Judge John W. Kern, III.

DISTRICT OF COLUMBIA COURT OF APPEALS

ROOSEVELT F. PALMORE,
APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

No. 5831

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed May 9, 1972]

Notice is hereby given that Roosevelt F. Palmore, the appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the District of Columbia Court of Appeals, affirming the judgment of conviction, entered herein on April 28, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) and 11 D.C. Code § 102 (Supp. IV, 1971).

[Signature omitted]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5831 January Term, 1972

ROOSEVELT F. PALMORE, APPELLANT,

v. No. 9217-71

UNITED STATES, APPELLEE.

BEFORE: Kelly, Kern and Nebeker, Associate Judges.

ORDER

[Filed May 11, 1972]

On consideration of appellant's motion to stay the transmittal of this Court's mandate to June 30, 1972, it is

ORDERED that appellant's aforesaid motion be granted and this Court shall stay transmittal of the mandate to and including June 30, 1972.

In the event appellant files an appeal in the Supreme Court of the United States on or before June 30, 1972, this Court shall further stay the transmittal of the mandate pending final disposition by the Supreme Court of the United States.

BY THE COURT:

/s/ Catherine B. Kelly
CATHERINE B. KELLY,
Associate Judge.

SUPREME COURT OF THE UNITED STATES

No. 72-11

ROOSEVELT F. PALMORE, APPELLANT,

v.

UNITED STATES

APPEAL from the District of Columbia Court of Appeals.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is postponed to the hearing of the case on the merits.

OCTOBER 10, 1972

☆ U.S. Government Printing Office: 1972—482-539/311

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MOTION OF UNITED STATES TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (J. S. App. 1-21) is reported at 290 A. 2d 573.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 28, 1972. On June 30, 1972, the jurisdictional statement was filed. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(2); alternative jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the Superior Court of the District of Columbia can constitutionally be vested with jurisdiction to try a felony prosecution brought under the District of Columbia Code.

2. Whether the evidence against appellant was obtained as the result of an unlawful search and seizure.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 8 provides, in pertinent part:

> The Congress shall have the Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *;
>
> And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

Art. III provides, in pertinent part:

> Section 1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges,

both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law, and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

After trial in the Superior Court of the District of Columbia, appellant was convicted of the felony of carrying an unregistered pistol after having previously been convicted of a felony, in violation of D.C. Code § 22-3204.[1] The pistol was discovered when the automobile appellant was driving was stopped by

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[1] The statute provides that violation of its provisions shall be punished as a misdemeanor under D.C. Code § 22-3215 unless the defendant has previously been convicted of a felony, in which case he is liable to imprisonment for up to ten years.

plainclothes police officers for a spot check. The officers had recognized from the license tags that the vehicle was rented and they had decided to conduct the spot check to determine whether appellant had a proper license and rental agreement. While one officer talked to appellant and examined his license and the apparently expired rental agreement, the other glanced into the interior of the vehicle with the assistance of a flashlight. Noticing the pistol protruding from under the front armrest, he removed it and—upon ascertaining that it was unregistered—arrested appellant.

Prior to trial, appellant moved to dismiss the indictment on the ground that the Superior Court, having been established pursuant to Article I, § 8, cl. 17 of the Constitution, lacked jurisdiction to try him for a felony; his claim was that only a court created under Article III of the Constitution has jurisdiction over a felony proscribed by Congress and prosecuted in the name of the United States. He also moved to suppress the pistol on the ground that it was discovered as the result of an unlawful search. Both motions were denied. The District of Columbia Court of Appeals affirmed the conviction.

ARGUMENT

1. Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves to dismiss the appeal on the ground that it is not within the juris-

diction of the Court.[2] Although appellant contends (J.S. 2-6) that this Court has jurisdiction to hear his appeal under 28 U.S.C. 1257(2), that provision confers jurisdiction only over decisions "where is drawn in question the validity of a statute of any state * * *," whereas the Act challenged by appellant, the District of Columbia Court Reorganization Act of 1970, P. L. 91-358, 84 Stat. 475, is a statute of the United States. See *e.g.*, *Baltimore & Potomac R. Co.* v. *Hopkins*, 130 U.S. 210.

Contrary to appellant's contention (J.S. 3-5), in enacting the Court Reorganization Act Congress did not intend to treat federal statutes pertaining exclusively to the District of Columbia as state statutes for purposes of Section 1257. When Congress intended that its statutes be treated as statutes of a state it expressly so stated. See 28 U.S.C. 1363. The policy considerations appellant offers as reasons for treating such federal statutes as state statutes for purposes of obtaining review under Section 1257 should therefore be addressed to the Congress and not to this Court.

Review of the judgment below therefore may properly be secured only by a writ of certiorari pursuant to 28 U.S.C. 1257(3). Accordingly, we believe the proper course is for this Court to treat the jurisdictional statement as a petition for a writ of certiorari. See 28 U.S.C. 2103, 2113; see, also, J.S. 6, n. 9.

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[2] If the court should conclude, contrary to the following argument, that it has jurisdiction to entertain an appeal, we move in the alternative that the judgment below be summarily affirmed. See Rule 16(1) of the Rules of this Court.

2. Appellant[a] contends (J.S. 13-19) that the District of Columbia Superior Court lacked jurisdiction to try his prosecution for a felony under the District of Columbia Code.[b] Appellant's argument starts with the fact that the judges of that court by statute have limited tenure and no protection against reductions in salary, and that the Superior Court is a legislative court established under Article I of the Constitution. The key contention, however, is that only a court established under Article III can be given jurisdiction to try a felony prosecution brought under an act of Congress which pertains exclusively to the District of Columbia. The court below fully considered and properly rejected this argument and its judgment warrants no further review.

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[a] In order to preserve consistency, the defendant below will continue to be styled herein as "appellant" even though his jurisdictional statement is viewed as a petition for a writ of certiorari.

[b] Appellant assumes that as a criminal defendant he has standing to assert an alleged deprivation of Article III guarantees of judicial salary and tenure. Such standing apparently was acknowledged in *Glidden Company* v. *Zdanok*, 370 U.S. 530, 533. But the basis of the litigants' rights to assert an Article III claim was not there fully articulated and remains unclear. For example, we know of no suggestion that the judgment of a federal trial or appellate court should be regarded as void on the ground that one of the judges was sitting as an unconfirmed recess appointee, even though such appointees do not yet enjoy Article III protection. See *United States* v. *Allocco*, 305 F. 2d 704, 709 (C.A. 2), certiorari denied, 352 U.S. 931. Compare *O'Donoghue* v. *United States*, 289 U.S. 516, a case on which appellant heavily relies, where the issue of Article III status was raised by District of Columbia judges whose salaries were being reduced.

It has long been recognized that Congress may, in the exercise of certain of its Article I and Article IV powers, establish courts not subject to the jurisdictional limitations, and whose judges are not entitled to the tenure and salary benefits, prescribed by Article III. *E.g., American Insurance Co.* v. *Canter*, 1 Pet. 511; *Ex parte Bakelite Corp.*, 279 U.S. 438. Contrary to appellant's statement (J.S. 17) this Court has expressly held that such legislative courts may be vested with "judicial power." *Williams* v. *United States*, 289 U.S. 553, 565-566.*

Appellant's references to the historic misdemeanor jurisdiction of the local District of Columbia courts as merely involving "municipal, police, and legislative power" (J.S. 16) obscure the important fact that these legislative courts (and others) have long exercised true judicial power. Perhaps the basic fallacy in appellant's position is the assumption that all judicial enforcement of rights and responsibilities created by Act of Congress must be entrusted to Article III courts exercising the "judicial power of the United States." This is erroneous, since, for example, state court judges lacking Article III protections frequently decide the federal rights and obligations of litigants —subject always, as with the District of Columbia local courts, to ultimate review by this Court.

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* Although a plurality of the Court in *Glidden Company* v. *Zdanok*, 370 U.S. 530, noted disapproval of the results in *Bakelite* and *Williams*, these cases have not been overruled and the propositions for which they are cited here were not controverted in *Glidden*.

The real issue in this case is whether the jurisdiction conferred on the District of Columbia Superior Court was properly within the Article I powers of Congress "[t]o exercise exclusive Legislation in all Cases whatsoever [in the District of Columbia]" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." But this issue has been decided against appellant, for a majority of this Court acknowledged in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, that Congress may confer judicial power upon the courts of the District of Columbia in the exercise of its Article I powers over the District. And see Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979, 991-992.*

Appellant urges that *O'Donoghue* v. *United States*, 289 U.S. 516, stands for the proposition that "the courts sitting in the District of Columbia exercise the judicial power conferred by Article III of the Constitution, and that the judges of the courts in the District of Columbia are accordingly entitled to the protections of Article III" (J.S. 17). However, this Court in *O'Donoghue* never suggested that Congress lacked power to establish an Article I court system for the District of Columbia. The question in *O'Donoghue* was only whether the old Supreme Court and Court of Appeals of the District of Colum-

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* Also see *O'Donoghue* v. *United States*, 289 U.S. 516, 545, where it was noted that Congress has plenary power under Article I to clothe District of Columbia courts "with such authority as a State may confer on her courts."

bia had in fact been established under Article III. In deciding that the courts there had been so established, the Court noted that their jurisdiction completely overlapped that of other federal district courts[1] and that the legislative history and statutory enabling language was consistent with a Congressional purpose to exercise Article III rather than Article I powers. The Court noted that there was no intent by Congress to have the cession of territory from Virginia and Maryland strip the residents of the District of Columbia of "the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Article III." 289 U.S. at 540. The Court's concern was that residents of the District of Columbia not be relegated to a lower status than Article III would afford them in Virginia or Maryland, or elsewhere.

But this analysis makes clear that *O'Donoghue* applies only where the very existence of the court must depend only on Article III, for quite evidently neither in that case nor elsewhere has this Court intimated that all suspects charged with "local-type felonies" must be tried before Article III judges. All Congress has sought to do in the 1970 Court Reorganization Act is to establish a local court system, comparable to those in states, that is distinct from the "federal courts" established in the District of Columbia and elsewhere under Article III. *O'Dono-*

[1] Full federal jurisdiction in the District of Columbia is now vested not in the District of Columbia courts but in the United States District Court and the United States Court of Appeals.

ghue cannot fairly be read to imply that congressional power under the District Clause of Article I to achieve this sound and modest result is lacking.

There is no historical or constitutional reason why the judicial power of Article I courts in the District of Columbia cannot extend to the administration of criminal justice. Indeed, as appellant concedes (J.S. 16, n. 27), the Court of General Sessions (the predecessor of the Superior Court) has for many years properly exercised jurisdiction over acts made offenses or misdemeanors by Act of Congress. Yet there is no constitutional basis for distinguishing between misdemeanor jurisdiction and jurisdiction over local felonies, *i.e.*, felonies under congressional statutes pertaining exclusively to the District of Columbia. Cf. *Argersinger* v. *Hamlin*, No. 70-5015, decided June 12, 1972. Thus it was well within the Article I powers of Congress to grant the Superior Court jurisdiction over local felonies. See *Lurk* v. *United States*, 296 F. 2d 360 (C.A. D.C.), affirmed on other grounds, 370 U.S. 530.

3. Appellant's Fourth Amendment claim (J.S. 20-25) raises no substantial question warranting review.[8] The opinion of the court below on this issue, on which we primarily rely, properly concluded that the officers here had "authority * * * to stop appellant for the sole purpose of asking him for his driving permit

[8] Appellant acknowledges that this claim is incapable independently of sustaining an appeal under 28 U.S.C. 1257 (J.S. 5-6). Thus this issue remains within certiorari jurisdiction. See *Mishkin* v. *New York*, 383 U.S. 502, 512-513.

and auto rental agreement," that upon his failure to show an unexpired agreement the officers "were entitled to detain him until the rightful ownership and use of [the] car could be clarified", that the need for safety made it reasonable for one of the officers to shine his flashlight into the car, and that in such circumstances the seizure of a pistol in plain view was not violative of the Fourth Amendment (J.S. App. 17).

The selective stopping of motor vehicles upon public highways to determine if the driver has the necessary permit and registration documents in his possession is an appropriate means for enforcing the common statutory requirements that drivers possess such documents when operating vehicles and exhibit them to police officers upon demand. See D.C. Code §§ 40-104(a)(1), 40-301(c); see also J.S. 24, n. 42, for a list of comparable state statutes. Given the threat to public safety created by the use of our highways by persons who have not been properly licensed or whose licenses have been suspended or revoked, and given the minimal intrusion that is involved, the practice followed in the present case is reasonable under the Fourth Amendment.

We know of no decisions holding either that officers must have an articulable basis for suspicion before they may stop vehicles for spot checks of this kind or that such stops made in good faith, as found below (J.S. App. 15-17), violate the Fourth Amendment. The decisions cited by appellant as in conflict with the ruling below (J.S. 24-25) are not. Neither

United States v. *Madril*, 445 F. 2d 827 (C.A. 9), nor *United States* v. *Fallon*, 457 F. 2d 15 (C.A. 10), nor *United States* v. *Thompson*, 420 F. 2d 536 (C.A. 3), was concerned with a "spot check" and in distinct contexts the courts found other automobile interceptions justified. Spot checks to ascertain whether operators are licensed to drive are, in light of circumstances like those here, reasonable as well.

CONCLUSION

It is therefore respectfully submitted that the appeal should be dismissed for lack of jurisdiction and, treating the jurisdictional statement as a petition for a writ of certiorari, that the petition should be denied. In the alternative, should the Court conclude that it has jurisdiction of the appeal, the judgment below should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

AUGUST 1972.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attorney for Appellant

Washington, D.C. • THIEL PRESS • (202) 393-0625

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 290 A.2d 573 and is reproduced in the single appendix (A.[1] 52). The oral opinion of the Superior Court of the District of Columbia is not officially reported, but is set forth in the single appendix (A. 8-11).

[1] The abbreviation "A" refers to the single appendix containing relevant portions of the record filed pursuant to Rule 36 of the Rules of this Court.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 28, 1972 (A. 69). A notice of appeal was filed in that court on May 9, 1972 (A. 70), and the record and jurisdictional statement were docketed in this Court on June 30, 1972. On October 10, 1972, this Court entered an order postponing consideration of the question of jurisdiction until the hearing of this case on the merits. For reasons set forth, *infra*, pp. 14-20, appellant contends that this Court's appellate jurisdiction has been properly invoked pursuant to the provisions of 11 D.C. Code §102 (1971) and 28 U.S.C. §1257(2). In the alternative, appellant invokes the jurisdiction of this Court to issue a writ of certiorari to the District of Columbia Court of Appeals pursuant to 28 U.S.C. §§ 1257(3), 2103, 2111.

QUESTIONS PRESENTED

1. Is an Act of Congress applicable exclusively to the District of Columbia "a law of [a] state" within the meaning of 28 U.S.C. §1257(2) as that statute is now made applicable to appeals from the District of Columbia Court of Appeals by 11 D.C. Code §102 (1971)?

2. Is a defendant charged by the United States of America with commission of a felony in the District of Columbia in violation of an Act of Congress enacted pursuant to Article I, §8 cl. 17 of the Constitution entitled, on timely demand, to have his case heard and determined by a court "ordained and established" in accordance with Article III, §1 of the Constitution?

3. Does the Fourth Amendment to the Constitution protect a motorist who has violated no law or traffic ordinance, and about whom police officers have no

articulable facts, from being selected by those officers and forcibly stopped for inspection of his driver's license and motor vehicle registration permit so that admission into evidence, over timely objection, of a gun discovered by the officers during such a selective forcible stop was error?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following sections of the District of Columbia Court Reorganization Act of 1970, 84 Stat. 473, are challenged on this appeal as repugnant to Article III, §1 of the Constitution: 11 D.C. Code §§101, 721(a), 923(a), 923(b)(1). Also involved are Article I, §8, cl. 17 and the Fourth Amendment to the Constitution, as well as 28 U.S.C. §1257, 11 D.C. Code §102, 22 D.C. Code §3204, and 40 D.C. Code §§104(a), 301(c). Pertinent portions of these constitutional and statutory provisions are set forth in the appendix, *infra*, pp. 1a-5a.

STATEMENT OF THE CASE

INTRODUCTION

Resolution of appellant's contention that the appellate jurisdiction of this Court has been properly invoked, *infra*, pp. 14-20, and that he was entitled to have his case heard and determined by a court "ordained and established" in accordance with the provisions of Article III, §1 of the Constitution, *infra*, pp. 20-46, does not require detailed consideration of the particular facts surrounding appellant's arrest, indictment, and trial. Thus, for the Court's convenience, we first set forth a summary of the pertinent developments of the case

sufficient to permit full consideration of these issues. Thereafter, as necessary for disposition of appellant's Fourth Amendment claim, *infra*, pp.47-61, we detail the pertinent facts of this case.

A. Summary of the Case

On February 23, 1971 a grand jury returned an indictment in the Superior Court of the District of Columbia charging appellant with carrying a dangerous weapon, a gun, in violation of the felony provisions of 22 D.C. Code §3204.[2] The Superior Court is not a court ordained and established in accordance with Article III, §1 of the Constitution. 11 D.C. Code §101 (1971). Prior to trial, appellant moved to dismiss the indictment, contending that only a court ordained and established in accordance with Article III of the Constitution had jurisdiction to hear and determine the charge against him (A. 4). The trial judge denied that motion. Thereafter, appellant was tried and convicted by the Superior Court and sentenced to imprisonment. An appeal was taken to the District of Columbia Court of Appeals where appellant again contended that he was entitled to have his case heard and determined by an Article III court.[3] In

[2]The crime proscribed by §3204 carries a misdemeanor punishment of imprisonment for not more than one year unless the accused has previously been convicted in the District of Columbia of a violation of §3204 or of any felony in the District of Columbia, or elsewhere, in which case a felony punishment of imprisonment for not more than ten years is provided. At arraignment, the Government filed an information of prior conviction (A. 3), and the case proceeded as a felony. The punishment imposed was a felony punishment (A. 50).

[3]Appellant also challenged the jurisdiction of the District of Columbia Court of Appeals on Article III grounds. See Brief for Appellant at 1, n. 1, in the District of Columbia Court of Appeals. The jurisdiction of the court of appeals has not been raised as a separate issue here since it is fairly embraced within the challenge to the trial court's jurisdiction.

both the Superior Court and the District of Columbia Court of Appeals, appellant contended that so much of the Court Reorganization Act of 1970, 84 Stat. 473, as purported to vest jurisdiction in the non-Article III "local" courts to hear and determine felony prosecutions was repugnant to Article III of the Constitution. The court of appeals affirmed appellant's conviction, 290 A.2d 573; A. 52, and appellant timely noted an appeal to this Court pursuant to the provisions of 11 D.C. Code §102 and 28 U.S.C. §1257(2).

B. The Facts

On January 16, 1971 Officers Busker and Morrissette were assigned to the Special Operations Division ("S.O.D.") of the Washington, D.C. Metropolitan Police Department, working in casual clothes in an unmarked police vehicle (A. 12). At about 8:00 p.m., these officers were parked at a curb when they observed appellant's car drive by (A. 20). Appellant had violated no law or traffic regulation, there was no apparent equipment defect on his automobile, and the officers had received no word that this vehicle was reported stolen (290 A.2d at 581; A. 61-62). Noting that the car had Virginia rental "tags" (A. 12),[4] the officers decided to stop appellant for the purpose of a "spot check" (A. 18, 35),[5] pursuant to instructions given them by "the commanding officer of

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[4]The officer testified that he was able to identify rental automobiles by the distinctive series of numbers assigned to the license plates (A. 13).

[5]A "spot check," also referred to interchangeably as a "traffic check" (A. 25), consists of stopping a vehicle and demanding that the operator produce for inspection his driver's license and registration certificate. (A. 18, 38).

S.O.D., our lieutenant, and our sergeants" (A. 19, 35). Officer Busker had never been instructed as to the basis by which he was to select a particular vehicle for a "spot check," and he believed that "this is left up to each individual officer" (A. 19). While his reason for stopping a particular automobile varies at "a given time" (A. 19), Officer Busker frequently stops rented automobiles and had been doing so for "over a year" when this case was tried (A. 22). He stops rented cars because:

> "... a lot of these cars are rented, and are not taken back on time, and on other occasions I have personally known where an officer stopped a rental car and got about $6,000 worth of dope out of the car" (A. 21).

Officer Busker testified that he was concerned about overdue rental cars because "it's a criminal charge" to operate a rental car with an overdue agreement (A. 26),[6] and he thus conducts "spot checks" so that "the man driving can prove that it's his car" (A. 25).[7]

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[6]Contrary to the officer's understanding, it is not a crime to operate a rented automobile with an expired agreement in the District of Columbia. *United States v. McLaughlin*, 278 F. Supp. 320 (D.D.C., 1967).

[7]Officer Morrissette, on the other hand, testified that his superiors had told him:

> "We could stop the kind of car that maybe a young teenager would be driver [sic] that you might think he was under age and didn't have a permit. You could stop a car that you suspected might be stolen. You could stop a car that just for not even having a taillight, you can stop the car, and when you inform the driver of the car that his taillight is out you also ask him for his permit and registration" (A. 36-37).

Officer Morrissette testified that it was not his "policy" to make "spot checks" of automobiles that did not fall into the categories which he listed (A. 37), and he did not recall ever having stopped a car for a "spot check" which was operated by a businessman in a suit (A. 37). The decision to stop appellant's car, however, was made by Officer Busker, not Officer Morrissette (A. 20, 35).

The Special Operations Division has prepared a form for its officers to complete when "spot checks" are made (A. 35). This form, which is not a numbered police department form (A. 36),[8] is handed in at the conclusion of an officer's duty and lists "the information that the department would like", including "the name, the address of the person driving, the color of the vehicle, the tag number, the driver's permit number, and the color, the number of occupants in it" (A. 35-36).

Pursuant to this "spot check" policy, the officers activated their red police light and siren and advised two other plainclothes officers, in a second unmarked police car, of their intentions (A. 20, 22, 29, 30). The second police car proceeded to "assist" in the "spot check" (A. 29, 38-39). Appellant pulled his car to a stop, got out of the vehicle, and walked toward Officer Busker (A. 14), who asked to inspect appellant's driver's permit and rental agreement form (A. 15). Appellant immediately produced a valid driver's license (A. 15) and returned to the automobile to obtain the rental form which was in the glove compartment (A. 15).[9]

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[8]Officer Busker testified that no written records of "spot checks" are made (A. 20), while Officer Morrissette testified that such records are made on special S.O.D. forms, but not on official police department forms (A. 35-36). The opinion of the district court in *Gomez v. Wilson*, 323 F. Supp. 87, 90 (D.D.C., 1971), published after the trial of this case, shows that there is an official police department form, Form No. 725, which is used to record "spot checks" of "suspicious vehicles" and "suspicious pedestrians" and that these forms "are turned in [and] filed and cross-indexed by name, nickname, stop location and (for motorists) tag number." 323 F. Supp. at 90 and n. 4.

[9]The police officer testified that appellant was not free to refuse his request to inspect these documents nor to leave the scene until he had complied with the officer's demand, and the officer would have prevented appellant from leaving had he attempted to do so (A. 28).

Appellant retrieved his rental agreement from the car and delivered it to Officer Busker. That agreement bore an expiration date several days earlier, and the officer engaged appellant in a conversation lasting a minute or two "about the rental agreement" (A. 18, 23).[10] While this conversation was taking place, Officer Morrissette stationed himself on the passenger side of the automobile in order to "protect" his partner (A. 38). He was "observing everything that might be inside the car" (A. 37) because there might be "numerous things in the glove compartment that [appellant] could be charged with" (A. 40). By shining his flashlight beam into the car (A. 32) and by "bending [his] torso" (A. 37), Officer Morissette observed "the hammer mechanism" of a gun under the lowered armrest (A. 32). He notified Officer Busker of his discovery, and appellant was placed under arrest (A. 18, 32-33).

At the conclusion of the testimony, the trial court held that the officers' conduct was not "unreasonable even under the Fourth Amendment to the Constitution" (A. 42) and denied the motion to suppress evidence (A. 43-44). Appellant elected to stand on his motion to suppress and, trial by jury having been waived (A. 6-7), it was stipulated that the court could consider the officers' testimony given at the hearing as if repeated at trial. It was further stipulated that appellant did not have a permit to carry a gun on January 16, 1971 and that the gun taken from his car was subsequently test-fired successfully (A. 49,

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[10]The court of appeals observed: "Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period." 290 A.2d at 581; A. 61.

[11] These are formal elements of the statutory offense proscribed by 22 D.C. Code §3204 (1967).

41-44).[11] The trial court overruled appellant's objection to the Government's offer of the gun into evidence (A. 44-45) and found appellant guilty (A. 47).

Appellant was thereafter sentenced to imprisonment for not less than two years, nor more than six years, execution of which was suspended, save for 180 days of confinement, on six years probation (A. 50). A timely appeal was taken to the District of Columbia Court of Appeals. On April 28, 1971, that court affirmed appellant's conviction (A. 69).

SUMMARY OF ARGUMENT

I.

In reorganizing the courts in the District of Columbia, Congress distinguished Acts of Congress of national applicability from those of local applicability. Jurisdiction over local statutes was vested in the local courts, and review in this Court from the final judgment of the highest local court is to be accomplished in accordance with 28 U.S.C. §1257. We submit that under this statutory scheme, a local statute is now to be deemed a "statute of a state" within the meaning of 28 U.S.C. §1257(2). This construction is required to harmonize the mode of review for final judgments of the District of Columbia Court of Appeals which Congress has provided in 11 D.C. Code §102 (1971). This construction, moreover, is the only construction which gives full meaning to the jurisdictional statute which Congress enacted. Finally, this construction is the same construction which this Court put on a similar jurisdictional statute more than fifty years ago. *Balzac v. Porto Rico*, 258 U.S. 298. For these reasons, we submit that this appeal was properly taken with respect to appellant's

claim that a local statute is repugnant to the federal Constitution. That being so, appellant's Fourth Amendment claim, while independently incapable of sustaining an appeal, is properly here. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547; *Mishkin v. New York*, 383 U.S. 502, 512-513.[12]

II.

Appellant stood trial on a felony indictment brought by the United States of America and charging a violation of an Act of Congress applicable exclusively to the District of Columbia. Over his timely objection, he was tried, convicted, and sentenced to imprisonment by a court not ordained and established pursuant to Article III of the Constitution. We contend that this was constitutional error. It is clear that an Act of Congress, albeit one applicable only to the District of Columbia, is a "law of the United States" within the meaning of Article III, §2 of the Constitution. It is also clear that a felony prosecution brought for violation of such a statute is a case "arising under" federal law within the meaning of Article III, §2, and it is conceded that neither legislative power nor executive power may be exercised in the hearing and determination of such a case. Thus, a so-called "legislative court," that is, a tribunal utilizing the judicial process but exercising legislative or executive power, was not competent to hear and determine appellant's case.

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[12]In any event, this Court's jurisdiction to review the judgment of the District of Columbia Court of Appeals by writ of certiorari is uncontestably plain, 11 D.C. Code §102 (1971); 28 U.S.C. §1257(3), and in the event the Court concludes that this appeal was improvidently noted, it nonetheless has jurisdiction to review the judgment in the exercise of its certiorari power.

There is nothing in Article I, §8, cl. 17 that authorizes Congress to disregard the mandate of Article III when it ordains and establishes the inferior courts to sit in the District of Columbia and exercise the judicial power of the United States. To be sure, Congress has plenary legislative power over the District of Columbia. Pursuant to that power, it may pass laws applicable to the District of Columbia without resorting to any of its other Article I powers. But, as the Court has repeatedly made clear, Congress may not disregard other provisions of the federal Constitution when it enacts laws for the District of Columbia. Thus, Congress must afford criminal defendants in the District of Columbia the right to grand jury indictment, and it must afford to criminal defendants in the District of Columbia a right to a trial by jury pursuant to Article III, §2 of the Constitution. And, we submit, Congress may not disregard the command of Article III when it "ordains and establishes" tribunals inferior to this Court to exercise the judicial power of the United States within the District of Columbia. *O'Donoghue v. United States*, 289 U.S. 516.

The fact that justices of the peace initially exercised jurisdiction in minor criminal offenses not involving punishments in excess of one year in jail and that those justices were not Article III officers, does not justify a departure from Article III's mandatory command. From the very beginning, Congress has treated such offenses as "legislative" or "municipal" matters. For present purposes, we can assume that Congress was correct and that there is a class of minor criminal offenses that would permit of, but do not necessarily require, exercise of the judicial power. That practice, historically limited to minor offenses, affords no justification for the wholesale abandonment of Article III's protections in serious felony cases.

Nor can disregard of Article III's command be justified by reference to the practice in the territories. The territorial courts were created out of necessity to accommodate the need for a judicial system in places not part of the permanent Union. That practice has no bearing on the applicability of Article III in the District of Columbia.

Finally, even if Congress could somehow be free of the command of Article III, if there were an overriding necessity for such freedom in order to carry out its legislative responsibilities in the District of Columbia, this piece of legislation could not stand. The legislative history makes it abundantly clear that Congress' quarrel with Article III is not that it makes impossible the discharge of Congress' plenary power in the District of Columbia but instead that it makes judges too independent. That may be a valid reason for proposing an amendment to Article III; it cannot justify its disregard.

III.

The evidence against appellant was obtained during a forcible, selective "spot check" of his driver's license and motor vehicle registration certificate. It is conceded that, at the time appellant was selected for such a check, the police officers had no basis to believe that he had engaged in criminal activity, and appellant had violated no law or traffic ordinance. The "spot check" was conducted by two plainclothes police officers, in an unmarked car, assisted by two other plainclothes officers in a second unmarked police car. These officers were acting in accordance with a "spot check" policy instituted by their superiors whereby individual officers are instructed to exercise their discretion to select individuals for such checks. This procedure includes the completion of formal

and informal forms which are completed by the officers and centrally filed and cross-indexed by the police department.

When appellant was forcibly stopped by police officers, he was "seized" within the meaning of the Fourth Amendment. Such a seizure is unreasonable and therefore condemned by the Fourth Amendment unless, at a minimum, police officers can point to specific and articulable facts which warrant the intrusion into personal liberty. Here, as the court of appeals expressly found, no such Fourth Amendment basis existed for the forcible stop, and the stop was accordingly violative of appellant's Fourth Amendment rights unless, as the court of appeals held, "health and safety" considerations justify departure from the minimum "articulable suspicion" standard.

In this case, there are no "health and safety" considerations. The record, viewed most favorably to the Government, shows that appellant was stopped, not for the purpose of ensuring compliance with safety regulations, but to investigate criminal conduct. As the stopping officers candidly admitted, appellant was stopped to see whether he was committing a criminal offense by operating an overdue rented automobile. A stop to investigate possible criminal behavior cannot be insulated from Fourth Amendment standards by the simple device of affixing a "health and safety" label to the police intrusion into the individual's right of movement.

Even if this were a "health and safety" case, the selective stopping of motorists under a police department policy such as is followed in the District of Columbia, whereby the individual officer on the street is given unbridled

discretion to select individuals for such seizures, unaided by any objective and non-discriminatory factors, cannot pass Fourth Amendment muster. While the Fourth Amendment will accommodate such "health and safety" inspections, it does not exempt such inspections from the constitutional requirement of reasonableness. With a procedure as potentially dangerous to Fourth Amendment freedoms as the practice of "spot checks," the Fourth Amendment commands the police to follow one of two alternatives. Either such check must be accomplished on an objective, non-discriminatory basis comparable to the area-wide inspection of dwellings held reasonable in *Camara v. Municipal Court*, 387 U.S. 523, or such checks, if they are to be conducted on a subjective, selective basis must be subject to the Fourth Amendment requirement of "articulable suspicion" enunciated in cases such as *Adams v. Williams*, 407 U.S. 143, and *Terry v. Ohio*, 392 U.S. 1. On neither basis, however, can the seizure of appellant survive Fourth Amendment scrutiny.

ARGUMENT

I.

THIS CASE IS PROPERLY HERE ON APPEAL

Both in the trial court and the District of Columbia Court of Appeals, appellant contended that so much of the District of Columbia Court Reorganization Act of 1970, 84 Stat. 473, as purports to vest jurisdiction to hear and determine felony cases in "courts" not ordained and established in accordance with Article III, §1 of the Constitution was repugnant to that constitutional provision.[13] That contention having been decided

[13]The claim of constitutional repugnance was timely raised both in the trial court and the District of Columbia Court of Appeals. See Defendant's Memorandum of Points and Authorities in

adversely to him in the court below, appellant timely noted an appeal to this Court from the final judgment of the District of Columbia Court of Appeals, the highest court in the District of Columbia wherein a decision could be had,[14] pursuant to 11 D.C. Code § 102 (1971) and 28 U.S.C. § 1257(2). The questoin of jurisdiction having been postponed until the hearing of the case on the merits, we turn at the outset to a demonstration that this Court's appellate jurisdiction has been properly invoked. Rule 26(6) of the Rules of this Court.

We start from the premise that, at least in this case involving only the mode not the availability of review, this Court's appellate jurisdiction is purely statutory. *E.g., Heike v. United States*, 217 U.S. 423, 428; *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 378. Since it is clear that the claim of constitutional repugnance was properly raised at all stages of the proceedings, and since the appeal was both noted and docketed in timely fashion, the dispositive issue is whether a "local" statute, *i.e.*, a law enacted by Congress and applicable exclusively to the District of Columbia, is a "statute of the United States" within the meaning of 28

Support of Motion to Dismiss Indictment, pp. 1-5 (Superior Court); Brief for Appellant, pp. 9-16 (District of Columbia Court of Appeals). Both the memorandum and the brief are in the record on appeal.

[14] 28 U.S.C. § 1257 (1971). Since appellant's case did not involve violation "of criminal laws of the United States which are not applicable exclusively to the District of Columbia," review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 11 D.C. Code § 301 (1971), following affirmance by the District of Columbia Court of Appeals, was not available.

U.S.C. §1257(1) or a "statute of [a] state" within the meaning of 28 U.S.C. §1257(2).

The United States contends that a local statute is a "statute of the United States" within the meaning of the first subsection of §1257. If the United States is correct, this appeal was improvidently noted and review here must be by writ of certiorari pursuant to 28 U.S.C. §1257(3), since the court of appeals sustained the constitutionality of the challenged statute. See 28 U.S.C. §§2103, 2111. We contend, however, that a local statute is now to be considered as a "statute of [a] state" within the meaning of the second subsection of §1257. If we are correct, this appeal was properly noted, since the court of appeals sustained the statute in the face of a claim of constitutional repugnance. There are several reasons which, we submit, compel the conclusion that Congress has treated local statutes as state statutes under the Court Reorganization Act, thus vesting this Court with appellate jurisdiction pursuant to 11 D.C. Code §102 (1971) and 28 U.S.C. §1257(2) in situations where, as here, the District of Columbia Court of Appeals has rejected a claim that a local statute is repugnant to the Constitution.

First, in reorganizing the courts in the District of Columbia, Congress chose to differentiate between "local" and "national" laws. The entire thrust of reorganization was to create a dual system of courts in the District of Columbia akin to the state-federal court systems existing in the several states. S. Rep. No. 405, 91st Cong., 1st Sess., at 5, 18, 19 (1969); H.R. Rep. No. 907, 91st Cong., 2d Sess., at 33-35, 45 (1970). In the reorganized court system, cases arising under "local" laws are principally to be heard and determined by the Superior Court of the District of Columbia, the "local"

court of general jurisdiction.[15] Appellate review of final judgments entered by the Superior Court is in the District of Columbia Court of Appeals, the "local" appellate court whose final judgments are subject to review in this Court "in accordance with" 28 U.S.C. §1257. 11 D.C. Code §102 (1971). Given the "national"-"local" division of jurisdiction among the courts in the District of Columbia, Congress' determination to pattern the mode of Supreme Court review of "local" appellate court decisions upon the state court model provided by 28 U.S.C. §1257 rather than the pattern provided by 28 U.S.C. §1254 governing review from the circuit courts reveals an intention to pattern the reorganized court system along "state"-"federal" lines. See S. Rep. No. 405, 91st Cong., 1st Sess., at 18 (1969); H.R. Rep. No. 907, 91st Cong., 2d Sess., at 33-35 (1970). To implement the mode of review which Congress provided, it is necessary to treat "local" statutes in the same manner as are statutes of the several states for purposes of invoking this Court's appellate jurisdiction.

Second, Congress clearly contemplated that some sort of review by appeal would be available to litigants seeking review of final judgments of the District of Columbia Court of Appeals. The express and unlimited employment of 28 U.S.C. §1257 rather than, for example, a limited use of §1257(3) makes this uncontestably clear,

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[15] While 11 D.C. Code §923(b)(1) (1971) purports to vest the Superior Court with "jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia," that court does not exercise exclusive original jurisdiction over such matters. The United States District Court is given jurisdiction to hear and determine such matters when "joined in the same information or indictment with any Federal offense." 11 D.C. Code §502(3) (1971).

since Congress has evidenced an ability to exclude review by appeal when it desires to do so. *E.g.*, 28 U.S.C. §§1255 (Court of Claims review by certiorari or certification); 1256 (Court of Customs and Patent Appeals by certiorari). Since Congress did not exclude §1257(2) from its jurisdictional statute, the construction for which we contend not only accords with the Congressional purpose underlying the reorganization legislation but is the only construction which gives full meaning to what Congress provided in 11 D.C. Code §102 (1971).

Third, this Court's holding in *Balzac v. Porto Rico*, 258 U.S. 298, firmly supports the statutory construction for which we contend. Here, as was the case in *Balzac*, Congress has provided that final judgments of the highest "local" court are to be reviewed by this Court in the same manner as are the final judgments of state courts. *Compare* 22 D.C. Code §102 (1970) *with* Act of January 28, 1915, ch. 22, §2, 38 Stat. 803. Now, as was true when *Balzac* was decided, the Congressional statute regulating the mode of Supreme Court review of state court judgments provides that an appeal lies from the final decision of the highest state court where was drawn into question the validity of a statute of a state on the ground of repugnance to the federal Constitution. *Compare* 28 U.S.C. §1257(2) *with* Act of September 6, 1916, ch. 448, §2, 39 Stat. 726. In *Balzac*, this Court construed such a statutory scheme to authorize review by writ of error, not certiorari, where the Supreme Court of Puerto Rico had sustained a statute applicable exclusively to Puerto Rico[16] in the face of a federal constitutional

[16] In other contexts, statutes applicable exclusively to Puerto Rico are not state statutes. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1.

challenge. That case compellingly dictates a similar construction here, for the Government has shown no new or extraordinary circumstances that would justify suddenly uprooting a statutory construction that has been undisturbed for fifty years and which has been accepted by the Congress.[17]

For these reasons, we submit that a statute of "local" applicability is to be deemed a "statute of [a] state" within the meaning of 28 U.S.C. §1257(2), as that section is made applicable to review in this Court of final judgments of the District of Columbia Court of Appeals by 11 D.C. Code §102 (1971), and that this Court's appellate jurisdiction has accordingly been properly invoked with respect to appellant's Article III claim.[18]

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[17] Congress has since enacted a separate statute for review in this Court of the final judgments of the Supreme Court of Puerto Rico, but it has not departed from the *Balzac* holding. See 28 U.S.C. §1258(2) authorizing review by appeal "where is drawn into question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

[18] *Cleary v. District of Columbia*, 406 U.S. 914, is not to the contrary. In that case, an appeal was taken from a judgment of the District of Columbia Court of Appeals which affirmed a conviction for violation of a local disorderly congregation statute, 22 D.C. Code §1107. In the court of appeals, however, Cleary made no claim that the local statute was repugnant to the Constitution. Instead, he argued only that the evidence did not support his conviction and that the trial judge had erroneously applied the reasonable doubt standard to the evidence presented to him. See Brief for Appellant, *Cleary v. District of Columbia*, No. 5916 (D.C.C.A.) at 1. This Court held that it had no jurisdiction to entertain Cleary's appeal, and, treating Cleary's jurisdictional statement as a petition for writ of certiorari, see 28 U.S.C. §§2103, 2111, the Court denied the petition. 406 U.S. 914. Here,

That being so, appellant's additional Fourth Amendment claim, while independently incapable of sustaining an appeal, is properly here. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547; *Mishkin v. New York*, 383 U.S. 502, 512-513.

II

APPELLANT WAS ENTITLED TO HAVE HIS CASE HEARD AND DETERMINED BY AN ARTICLE III COURT

Appellant stood trial on a felony indictment returned in the name of the United States of America and charging him with violation of an Act of Congress applicable exclusively to the District of Columbia. If convicted, appellant faced imprisonment for up to ten years.[19] Despite his timely objection, appellant was tried, convicted and sentenced by a court not ordained and established in accordance with Article III of the Constitution and presided over by a judge holding office for a fixed term of years whose salary is not protected from diminishment during his continuance in office and who is subject to removal from office by a process other

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unlike *Cleary*, appellant has directly attacked the constitutionality of a local statute at all stages of the proceeding. It is the unsuccessful assertion of a claim that a local statute is repugnant to the Constitution, not the fact that a prosecution was instituted under a local statute, as was the case in *Cleary*, that gives rise to a right of appeal under 28 U.S.C. §1257(2).

[19] In fact, appellant received a sentence of imprisonment for not less than two years nor more than six years. Service of the sentence was suspended, except for six months, on condition of six years probation (A. 50).

than impeachment by the House of Representatives and conviction by the Senate. This, we contend, was serious constitutional error.[20]

Our argument proceeds as follows: (1) a felony prosecution involving violation of an Act of Congress

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[20]The Government has suggested that appellant lacks standing to challenge the constitutional status of the court which imposed sentence upon him (Motion to Dismiss at 6 n. 4). That contention, raised in neither the trial court nor the court of appeals, must be rejected. The safeguards afforded to federal judges under Article III are designed, not so much to protect judges as to make them independent, thereby guaranteeing to the litigants before them a judgment uninfluenced, either consciously or unconsciously, by the clamor of day-to-day issues of the intimidating influence of other branches of government. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17; *Evans v. Gore*, 253 U.S. 245, 253; *O'Donoghue v. United States*, 289 U.S. 516, 532-534; *cf. United States v. Brewster*, 408 U.S. 501, 507. As Congress put it in providing for lifetime tenure for the federal judges in Puerto Rico:

> "... Federal litigants in Puerto Rico should not be denied the benefit of judges made independent by life tenure from the pressures of those who might influence his chances of reappointment, which benefits the Constitution guarantees to the litigants in all other Federal courts." H.R. Rep. No. 135, 89th Cong., 1st Sess. at 2 (1965); S. Rep. No. 1504, 89th Cong., 2d Sess. at 2 (1966).

This is the "benefit" which appellant timely demanded in the courts below, and which he seeks to obtain here. He obviously has standing to claim the very benefit which Article III was designed to confer. *E.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 533, 536 (opinion of Harlan, J.); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-17; *United States v. Montanez*, 226 F. Supp. 593 (S.D. N.Y. 1964), *aff'd*, 371 F.2d 79 (2 Cir. 1967); *Benitez Suarez v. United States*, 328 F.2d 473 (1 Cir. 1964); *United States v. Allocco*, 305 F.2d 704 (2 Cir.), *cert. denied*, 352 U.S. 931 (1956); Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979, 1005-1012 (1962).

applicable exclusively to the District of Columbia is a case "arising under . . . the Laws of the United States" within the meaning of Article III, §2 of the Constitution; (2) unlike other matters arising under the laws of the United States which permit of, but do not necessarily require, exercise of the judicial power of the United States for resolution, a felony prosecution brought by the United States of America can only be resolved by an exercise of judicial power; (3) the judicial power of the United States as defined in Article III, §2 can only be exercised by a court ordained and established in accordance with the provisions of Article III, §1; and (4) the provisions of Article I, §8, cl. 17 do not afford a basis for disregard of these principles in the District of Columbia. We address these points *seriatim*.

A. Appellant's Case Arose Under the Laws of the United States

An Act of Congress, albeit one enacted pursuant to Article I, §8, cl. 17 of the Constitution, is a "law of the United States" within the meaning of Article III, §1 of the Constitution. *E.g., United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488; *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 432-435; *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1, 9; *Cohens v. Virginia*, 6 Wheat. 264, 424-429; *United States v. More*, 3 Cranch 159 (C.C. D.C.) (Marshall, C.J. and Cranch, C.J.), *error dismissed*, 3 Cranch 159 (1805); *United States v. Cella*, 37 App. D.C. 433, 435 (1911); *United States v. Williams*, Fed. Cas. No. 16,712, 4 D.C. 372, 377, 392, 396 (1833) (Cranch, C.J.); *cf. United States v. Vuitch*, 402 U.S. 62, 64-67; *Shapiro v. Thompson*, 394 U.S. 618, 625 n. 4. This proposition is not only abundantly clear from the plain words of Article

III itself,[21] but is firmly established by this Court's historical exercise of its appellate jurisdiction with respect to "local" District of Columbia statutes.

It is axiomatic that this Court cannot constitutionally exercise its appellate jurisdiction except in those cases embraced by Article III's definition of the judicial power. *E.g., Martin v. Hunter's Lessee,* 1 Wheat. 304, 337; *Ex parte Yerger,* 8 Wall. 85, 98; *The Francis Wright,* 105 U.S. 381, 385. Thus, as Mr. Justice Johnson long ago pointed out, this Court's appellate jurisdiction with respect to cases and controversies coming to it from the District of Columbia "can be maintained only on the ground that the laws of that district are the laws of the United States . . . ." *American Insurance Co. v. Canter,* 1 Pet. 514 n. (a), 523 (C.C. S.C.), *aff'd,* 1 Pet. 511 (1828). It is only because laws applicable exclusively to the District of Columbia are "laws of the United States" that this Court properly exercised appellate jurisdiction in cases such as *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (construction of "local" tax statutes); *Kent v. United States,* 383 U.S. 541 (construction of "local" juvenile court statute); *Fisher v. United States,* 328 U.S. 463 (construction of "local" murder statute); *Mason v. Fearson,* 9 How. 248 (construction of "local" tax sale statute); *Corporation of Washington v. Pratt,* 8 Wheat. 680 (construction of "local" municipal incorporation statute). Precisely the

[21] During the Constitutional Convention, Charles Pinckney, discussing a draft of Article III, asserted that "law of the United States" referred to "any of the regulations of Congress in pursuance of their powers. . . ." 3 Records of the Federal Convention 106, 117 (Farrand ed. 1966). See generally, II Story, *Commentaries on the Constitution* §§1228-1235 (4th ed. 1873).

same Article III reason justifies exercise of this Court's appellate jurisdiction in cases coming from state courts involving a "local" statute. *E.g., Ancient Egyptian Order v. Michaux*, 279 U.S. 737; *Creswill v. Knights of Pythias*, 225 U.S. 246; *cf. Mayor & Aldermen v. Eslava*, 16 Pet. 234.

B. Disposition of Appellant's Case Required Exercise of the Judicial Power of the United States

That appellant's case arose under the laws of the United States within the meaning of Article III, § 2 of the Constitution does not necessarily mean that disposition of his case required an exercise of the judicial power of the United States conferred upon this Court and the inferior federal courts by Article III, § 1. This Court has repeatedly made it clear that many matters are capable of, but do not necessarily require, exercise of the judicial power of the United States for disposition, *E.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 549-550 (opinion of Harlan, J.); *Crowell v. Benson*, 285 U.S. 22, 50; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 280, 284. Among such matters are money claims against the United States,[22] patent claims,[23] claims under the customs and revenue laws,[24] claims involving

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[22] Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-558 (opinion of Harlan, J.) with *Williams v. United States*, 289 U.S. 553.

[23] *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-552, 558-561; *Brenner v. Mason*, 383 U.S. 519, 523-527.

[24] Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, with *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716.

membership in Indian tribes[25] and the like.[26] These kinds of matters, being susceptible of disposition by exercise of legislative or executive power, do not necessarily require exercise of the judicial power of the United States. *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-551 (opinion of Harlan, J.), 590-591 (Douglas, J., dissenting). Sometimes legislative power is directly applied to such matters.[27] On other occasions, special tribunals utilizing the judicial process, but not exercising the judicial power, have been created to deal with such matters.[28] On still other occasions, Congress has elected

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[25] *Wallace v. Adams*, 204 U.S. 415.

[26] Compare *United States v. Coe*, 155 U.S. 76 with 2 Records of the Federal Convention 466 (Farrand ed., 1966).

[27] A private bill is the classic example.

[28] The term "legislative court" has frequently been applied to such tribunals, and it is perhaps unfortunate that that particular term was coined. As Mr. Justice Harlan has observed , "the distinction referred to in [the] cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy." *Glidden Co. v. Zdanok*, 370 U.S. 530, 534. The confusion is readily evident in the many efforts which have been made to clarify the distinction. See, *e.g.*, Watson, *The Concept of the Legislative Court - A Constitutional Fiction*, 10 Geo. Wash. L. Rev. 799 (1942); Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930); Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979 (1962); Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133 (1962). If by "legislative court" one means a tribunal utilizing the judicial process but not ordained and established in accordance with Article III of the Constitution, there are, in fact, two distinct types of "legislative courts." On the one hand, there are those tribunals dealing with matters not necessarily requiring exercise of the judicial power of the United States while, on the other hand, there are the territorial courts which have historically dealt with matters

to commit such matters to an "inferior court" ordained and established pursuant to, and exercising the judicial power conferred by Article III. *Glidden Co. v. Zdanok*, 370 U.S. 530. Whatever the outer reach of the permissible use of legislative or executive power in that kind of matter which permits of, but does not require, disposition by exercise of the judicial power, it cannot seriously be maintained that a general felony prosecution, such as in issue here, is capable of either legislative[29] or

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which, at least if adjudicated in the permanent portions of the Union, require exercise of the judicial power. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 542-548, 550-552 (opinion of Harlan, J.); Harris, *The Judicial Power of the United States* 184-186 (1940). Since the essential inquiry is not the name of the tribunal, but the nature of the power it is exercising, *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 453; *Williams v. United States*, 289 U.S. 553, 578, we temporarily put to one side the territorial courts, see *infra*, pp. 36-39, and refer at this point only to the former category of "legislative courts," *i.e.*, those exercising non-judicial power in the disposition of matters not requiring exercise of judicial power. *Williams v. United States, supra*, 289 U.S. at 579, 581.

[29] Article I, §9, cl. 3 of the Constitution expressly forbids exercise of the legislative power to enact bills of attainder. This prohibition extends to bills of pains and penalties. *United States v. Lovett*, 328 U.S. 303, 315; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277; *Drehman v. Stifle*, 8 Wall. 595, 601. That, as a general proposition, legislative power cannot be used to adjudicate guilt or impose a punishment in a criminal prosecution is clear, not only from the prohibition against enactment of bills of attainder, but also the express limitation on the legislature's impeachment power. Although impeachment will lie in the case of "treason, bribery, or other high crimes and misdemeanors" (U.S. Const. art. II, §4), the legislative judgment "shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States . . ." (U.S. Const. art. I, §3, cl. 7). To be sure, the legislature is empowered to punish its members for lack of attendance and "disorderly behavior" (U.S. Const. art. I,

executive[30] determination. This class of case involves only and exclusively exercise of the judicial power of the United States as defined in Article III of the Constitution. *Wong Wing v. United States*, 163 U.S. 228; *cf. Interstate Commerce Commission v. Brimson*, 154 U.S. 447.

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§5, cl. 1, 2). *In re Chapman*, 166 U.S. 661. Whatever the reach of that power, and whatever constitutional restraints may be applicable to such a proceeding, it is clear that the power being exercised is legislative power expressly conferred upon the Congress by the Constitution. See generally, *United States v. Brewster*, 408 U.S. 501, 519-520; *Powell v. McCormack*, 395 U.S. 486; *United States v. Johnson*, 383 U.S. 169; *United States v. Brewster*, 408 U.S. 501, 543-544 (Brennan, J., dissenting), 551-552 (White, J., dissenting). Legislative power also permits imposition of punishment upon the non-member who commits a contempt before Congress. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597; *Anderson v. Dunn*, 6 Wheat. 204; cf. *McGrain v. Daugherty*, 273 U.S. 135. The legislative power to inflict punishment upon a non-member is a narrow one expressly limited to the "right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty . . . ." *Marshall v. Gordon*, 243 U.S. 521, 542. Obviously, there are no such justifications for exercise of legislative power in this case.

[30]See *Reid v. Covert*, 354 U.S. 1, 38-39 (opinion of Black, J.); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447. As is true with the legislative power, there are some very narrow exceptions. Trial by court martial involves, not the judicial power, but the executive's power as commander-in-chief (U.S. Const. art. II, §2, cl. 1) and perhaps the legislative power with respect to the armed forces (U.S. Const. art. I, §8, cl. 13, 14, 16). *Dynes v. Hoover*, 20 How. 65, 79. See *Kahn v. Anderson*, 255 U.S. 1, 6-7; *Ex parte Reed*, 100 U.S. 13, 21. The President's power as commander-in-chief permits him to establish an executive tribunal to hear and determine a criminal charge brought against an enemy alien in time of war. *Ex parte Quirin*, 317 U.S. 1. See *In re Yamashita*, 327 U.S. 1. By the same token, there is a narrow class

C. Only A Court "Ordained and Established" In Accordance With Article III Can Exercise The Judicial Power of the United States.

While it is true that one cannot demand a constitutional court in a case "equally susceptible of legislative or executive determination,"[31] we think that one is necessarily entitled to such a court in a case not susceptible of legislative or executive determination. This follows, we submit, not only from the unambiguous command of Article III that the judicial power of the United States "shall" be vested in this Court and the "inferior courts" ordained and established in accordance with that article's requirements, but also from this Court's determination that a tribunal which is not so ordained and established is "incapable" of exercising the judicial power of the United States as defined in Article III. *Williams v. United States*, 289 U.S. 553, 565; *American Insurance Co. v. Canter*, 1 Pet. 511, 546. While willing to assume that disposition of local felony cases in the District of Columbia could only involve an exercise of judicial power, the court of appeals found a "species" of judicial power "wholly separate and apart" from Article

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of cases where executive power may be exercised to hear and determine a criminal charge brought against a civilian in occupied territory following the cessation of hostilities. *Madsen v. Kinsella*, 343 U.S. 341. See *Mechanics' and Traders' Bank v. Union Bank*, 22 Wall. 276; *The Grapeshot*, 9 Wall. 129; *cf. Santiago v. Nogueras*, 214 U.S. 260; *Neely v. Henkel*, 180 U.S. 109. As is true with the limited use of legislative power to impose punishments, this power is a narrow one and extends just far enough to permit the President to discharge his constitutional duties as commander-in-chief. See *Reid v. Covert*, 354 U.S. 1; *United States ex rel. Toth v. Quarles*, 350 U.S. 11; *Ex parte Milligan*, 4 Wall. 2.

[31] *Williams v. United States*, 289 U.S. 553, 579.

III which it held Congress could vest "upon District courts free of the limitations contained in Article III ...." 290 A.2d at 577, 578; A. 55-56. We thus turn to an examination of the unique status of the District of Columbia and demonstrate that nothing in Article I, §8, cl. 17 permits Congress to disregard the limitations of Article III when it "ordains and establishes" courts in the District of Columbia to exercise Article III's judicial power.

D. When Vesting the Judicial Power of the United States in Courts in the District of Columbia, Congress Is Subject to the Limitations of Article III.

The plenary legislative power of Congress with respect to the District of Columbia is well established. Article I, §8, cl. 17 gives Congress the power of "exclusive legislation" with respect to the District of Columbia. That grant of legislative power is amply sufficient to enable Congress to pass laws applicable to the District of Columbia without resort to any other provision of Article I. Compare 22 D.C. Code §3204, the statute under which appellant stood trial, with *United States v. Bass*, 404 U.S. 336. That plenary grant of legislative power permits Congress to establish the method by which the District of Columbia will be governed, and to alter the form of the local government from time to time. See *District of Columbia v. Thompson Co.*, 346 U.S. 100, 104-110. But to say that the legislative power of Congress with respect to the District of Columbia is plenary does not mean that exercise of that power is free of the restraint imposed by other provisions of the Constitution. This Court has repeatedly held otherwise. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *O'Donoghue v. United States*, 289 U.S. 516, 545; *Downes v. Bidwell*,

182 U.S. 244, 260-261; *Callan v. Wilson*, 127 U.S. 540, 550. Thus, Congress may not dispense with the right to indictment by a grand jury for a local criminal offense in the District of Columbia. *United States v. Moreland*, 258 U.S. 433. Neither may Congress deprive a defendant charged with a local criminal offense the right to a jury trial pursuant to Article III of the Constitution. *District of Columbia v. Colts*, 282 U.S. 63, 74; *Callan v. Wilson*, 127 U.S. 540.[32] Nor, we submit, under the holding of *O'Donoghue v. United States*, 289 U.S. 516, may Congress deprive a defendant charged with a local felony offense the right to have his case heard and determined by a court ordained and established in accordance with Article III.

While we think that *O'Donoghue v. United States, supra*, authoritatively disposes of the contrary holding by the court of appeals,[33] we address separately the power

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[32]With respect to a local civil action, Congress may not deprive the litigants of the right to a trial by jury in accordance with the Seventh Amendment. *Capital Traction Co. v. Hof*, 174 U.S. 1.

[33]The court of appeals sought to distinguish *O'Donoghue* by surmising that Mr. Justice Sutherland must have intended to refer only to that portion of the jurisdiction of the federal courts in the District of Columbia as was parallel "with the other inferior *federal* courts in the several states." 290 A.2d at 579, n. 15; A. 59 n. 15). There is nothing in *O'Donoghue* that even remotely suggests that such a distinction was intended. Indeed, in view of Mr. Chief Justice Hughes' dissent, which relied heavily upon the plenary powers of Congress with respect to the District of Columbia, it is unlikely that the distinction which the court of appeals strained to draw would have been allowed to go without comment. Moreover, it must be assumed that this Court was generally familiar with the workloads of the federal courts at the time it wrote its opinion in *O'Donoghue*. During fiscal year 1933, the Supreme Court of the District of Columbia had filed with it 7,275 criminal cases and 4,798 civil actions. Annual Report of the Attorney General 146 (1933). No other federal court approached that caseload, no doubt

of Congress to establish courts in the District of Columbia and the territorial courts since both those matters received extensive treatment in the opinion of the court of appeals (290 A.2d at 576-580; A. 55-61). We then address as a separate proposition the contention that Congress is free of the commands of Article III when it established courts to exercise the judicial power of the United States in the District of Columbia.

1. *The Power of Congress To Establish Courts in the District of Columbia*

In concluding that Article I, §8, cl. 17 permits Congress to "confer a 'judicial power' wholly separate and apart from its authority under article III" in courts in the District of Columbia (290 A.2d at 577; A. 55), the court of appeals confused two distinct and separate principles. The first is that Congress may vest in Article III courts sitting in the District of Columbia powers that it has not[34] or perhaps could not[35] vest in Article III courts

due to the "local" jurisdiction exercised by the Supreme Court of the District of Columbia. The kinds of criminal prosecutions brought then in the District of Columbia courts were, as they continue to be, predominantly "local." Annual Report of the Attorney General 163-165 (1931). With all respect to the court of appeals, the distinction it purported to see in *O'Donoghue* between "local" and "federal" jurisdiction is simply not there.

[34] *Kendall v. United States*, 12 Pet. 524, merely held that the Circuit Court of the District of Columbia, an Article III court, had jurisdiction to issue a writ of mandamus pursuant to Sections 3 and 5 of the Organic Act of 1801, 2 Stat. 103, directed to the Postmaster General of the United States and commanding him to obey a private Act of Congress and perform a mandatory duty which he owed to the plaintiffs. There is nothing in Article III which would have then precluded Congress from conferring such a power upon all Article III courts as it has since done by 28 U.S.C. §1361.

[35] The court of appeals properly did not rely on the so-called hybrid jurisdiction cases. See, *e.g.*, *Federal Radio Commission v.*

sitting in the several states. That principle has no bearing on a case such as this which, as we have shown, *supra*, pp. 24-27, involves exercise of Article III's judicial power.[36] The issue here is not whether an Article III court, either in the District of Columbia or elsewhere[37]

General Electric Co., 281 U.S. 464; *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442-443. Those cases hold that Congress, in the exercise of its plenary power over the District of Columbia, may vest in Article III courts sitting in the District of Columbia administrative or legislative powers. Arguably, Article III courts and officers not sitting in the District of Columbia would be precluded from exercise of such powers. *But see National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 583-604 (opinion of Jackson, J.). But even on the assumption that such powers could not be vested in Article III courts sitting outside the District of Columbia, those cases cannot support an argument that Congress may vest Article III's judicial power in an administrative or legislative tribunal. *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 n. 53 (opinion of Harlan, J.), 590 n. 1 (opinion of Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 547-548. Moreover, as Mr. Justice Harlan has observed, the powers held to be administrative or legislative in *Radio Commission* and *Keller* "[have] long since been transformed into judicial business." *Glidden Co. v. Zdanok*, *supra*, 370 U.S. at 580 n. 53. This case does not call for reexamination of the question as to whether Congress may vest such administrative or legislative functions in Article III courts sitting in the District of Columbia.

[36] In *Lurk v. United States*, 111 U.S. App. D.C. 238, 296 F.2d 360 (1961) (en banc), *aff'd on other grounds sub nom. Glidden Co. v. Zdanok*, 370 U.S. 530, the court of appeals held that a trial for a local felony in the District of Columbia does not require an Article III court. This Court expressly reserved judgment on that issue, 370 U.S. at 537.

[37] *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, holds that Article III courts in the several states may exercise diversity jurisdiction in suits between a citizen of a state and a citizen of the District of Columbia.

may exercise a non-Article III power, but whether a non-Article III court may be empowered to exercise Article III's judicial power. Compare *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 N. 53 (opinion of Harlan, J.), 590 n. 1 (opinion of Douglas, J., dissenting); *O'Donoghue v. United States*, 289 U.S. 516, 547-548.

Second, relying on the historical fact that non-Article III officers[38] have always exercised jurisdiction over minor criminal offenses within the District of Columbia, the court of appeals concluded that Congress is free of the limitations of Article III when it vests courts in the District of Columbia with the judicial power of the United States. The court of appeals missed the point, for neither this Court nor any other has ever held that only the judicial power of the United States may be exercised in the hearing and determination of a minor criminal offense, and there is substantial historical support for the proposition that these offenses have involved, not exercise of the judicial power, but instead legislative, police and municipal power.

That Congress was early aware of the distinction between judicial power and legislative power is clear from careful analysis of the way by which it distributed jurisdiction over criminal cases in the District of Columbia.[39] From 1801,[40] until the challenged statute

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[38] *But see United States v. More*, 3 Cranch 159 (C.C.D.C. 1805) (Marshall, C.J. and Cranch, C.J.), error dismissed, 3 Cranch 159.

[39] This early practice by Congress is persuasive evidence of the meaning of Article III. *E.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 279-280.

[40] Prior to this time, Maryland and Virginia continued to exercise sovereignty over the District of Columbia pursuant to the express provision in the Act of July 16, 1790, ch. 28, §1, 1 Stat. 130. See *United States v. Hammond*, 1 D.C. 15 (1801); *United States v. Heinegan*, 1 D.C. 50 (1802).

took effect in 1971, Congress provided that jurisdiction to hear and determine felony cases was exclusively committed to courts ordained and established in accordance with Article III.[41] Simultaneously, Congress

[41]The Organic Act of 1801, 2 Stat. 103, provided that the Circuit Court for the District of Columbia, whose judges held office "during good behavior" would exercise the same jurisdiction as did the circuit courts in the several states. Act of February 27, 1801, ch. 15, §3, 2 Stat. 103. A year later, the District Court, the judges of which also held office during "good behavior", assumed such jurisdiction. Act of April 29, 1802, ch. 31, §24, 2 Stat. 156. Thereafter, in 1838, Congress transferred such jurisdiction to the Criminal Court of the District of Columbia. Act of July 7, 1838, ch. 192, §1, 5 Stat. 306. From the fact that the statute provided no term of office for the judge, the court of appeals concluded that the Criminal Court was not an Article III court (290 A.2d at 576 n. 7; A. 00). The court drew the wrong conclusion. Not only does the absence of a specific term of office support the conclusion that the Criminal Court was a constitutional court, examination of the commissions issued to the judges of that court conclusively demonstrate that the President and the Congress treated that court as a constitutional court. On December 27, 1838, President Van Buren appointed James Dunlop to serve as a judge of that court "during his good behavior." When Judge Dunlop resigned in 1845, see 1 Hayw. & H. v. (1907), a recess appointment was issued to Thomas H. Crawford "until the end of the next session of the Senate of the United States and no longer." Thereafter, Judge Crawford was appointed to the constitutional "good behavior" term of office. General Records of the Department of State, Record Group 59, Judge's Commissions, vol. 1, National Archives of the United States. (Included in the original commissions issued to judges of the Criminal Court is a commission issued by President Van Buren to Thomas F. Mason on July 7, 1838. That commission does not specify a term of office, either by reference to a period of years or to the constitutional term of "good behavior." We have been unable to ascertain whether Mr. Mason ever assumed office and, if so, how long he served. Mr. Mason's commission, as filed with the National Archives, bears a hand written notation, "Martin Van Buren (dead)." Since President Van Buren remained in office until 1841 and was the president who signed Judge Dunlop's "good behavior" commission in December 1838, it is possible that Mr. Mason died before assuming office.)

provided that justices of the peace had jurisdiction to hear and determine minor criminal matters and impose punishments not exceeding one year in jail.[42] The powers vested in the early justices of the peace, and later in the Police Court for the District of Columbia,[43] were thought by Congress to involve "general administrative, police, and legislative powers." These matters did not involve exercise of the judicial power of the United States,[44] and both this Court and the District of Columbia courts always referred to such jurisdiction as "petty"[45] or non "infamous".[46] Whether the line drawn by Congress at one

[42]The Organic Act of 1801 authorized justices of the peace to discharge the duties "civil and criminal" which had theretofore been exercised by the justices of the peace of Maryland and Virginia. Act of February 27, 1801, ch. 15, §11, 2 Stat. 103. In 1812, Congress delegated administrative, police and legislative powers to the local government of the District of Columbia defining such powers to include the right to punish by whipping (not exceeding forty stripes) or by jailing not exceeding one year of persons found guilty of certain offenses such as "begging or [being] drunk in or about the streets," "eavesdroppers and night walkers" and "public prostitutes." Act of May 4, 1812, ch. 74, §6, 2 Stat. 721. Subsequent statutes expanded the kinds of offenses which the local government was authorized to punish by jailing for not more than a year, but carefully defined such powers as "power and authority" of the "corporation." Act of May 15, 1820, ch. 104, §8, 3 Stat. 583; Act of May 17, 1848, ch.42, §14, 9 Stat. 223 ("violations of the police regulations and penal laws of the corporation").

[43]The Police Court assumed the jurisdiction of the local justices of the peace in 1870. Act of June 17, 1870, ch. 133, 16 Stat. 153.

[44]*Capital Traction Co. v. Hof*, 174 U.S. 1, 16-18, 45 (civil jurisdiction); *United States v. Mills*, 11 App. D.C. 500 (1897) (criminal jurisdiction).

[45]*United States v. Mills, supra*, 11 App. D.C. at 507 ("petty"); *Gassenheimer v. District of Columbia*, 6 App. D.C. 108, 115 (1895) ("petty").

[46]*Callan v. Wilson*, 127 U.S. 540, 556 (not "infamous" or "punishable by imprisonment in the penitentiary").

year in jail is the proper dividing line between those criminal matters which do not necessarily require exercise of the judicial power of the United States is a matter for another day.[47] It suffices for present purposes to note that this minor criminal jurisdiction, always regarded as outside the compulsory reach of Article III, affords no support for the proposition that Congress may disregard the command of Article III in cases concededly requiring exercise of the judicial power of the United States.

2. *The Territorial Court Cases Afford No Support for the Disregard of Article III in the District of Columbia.*

Recognizing that this Court's holding in *O'Donoghue v. United States*, 289 U.S. 516, authoritatively rejected

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[47] In accommodating the commands of the Constitution to the so-called minor or petty offense, each constitutional provision must be examined independently. Thus, for example, the right to counsel extends to all matters in which there is to be a punishment of incarceration. *Argersinger v. Hamlin*, 407 U.S. 25. Trial by jury in a criminal case is not required for "petty" offenses even though incarceration for a limited period of time may be imposed for such an offense. *Cheff v. Schnackenberg*, 384 U.S. 373; *District of Columbia v. Clawans*, 300 U.S. 617. An indictment is required for "infamous" crimes punishable by imprisonment in a penitentiary. *United States v. Moreland*, 258 U.S. 433. Whether a one year dividing line between cases which require exercise of judicial power, and those which merely permit of, but do not necessarily require, exercise of that power is proper is an issue for another day. It suffices for present purposes to note that Congress has treated that factor as the dividing line, not only in the District of Columbia, see *supra*, pp. 30-36, but in the several states. See 18 U.S.C. §3401 (1972) which authorizes a United States Commissioner, a non-Article III officer, to try "minor" offenses punishable by not more than one year incarceration. See also 23 D.C. Code §101(a) (1971).

an effort to justify disregard of Article III's limitations in the District of Columbia by resort to the territorial court cases, the court of appeals nevertheless suggested that local conditions might justify reexamination of the *O'Donoghue* holding (290 A.2d at 576 n. 5; A. 00). The court fundamentally missed the point. In the first place, this Court carefully reexamined the constitutional premises of *O'Donoghue* as late as *Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 539, 542, 543, 548, 580 (opinion of Harlan, J.), 590 n. 1, 599, 605 (opinion of Douglas, J., dissenting), and reaffirmed those premises. In the second place, the fundamental premise of *O'Donoghue* is the different source of the "judicial power" being then exercised by the territorial courts. That is a problem which has vexed the Court from the time it first grappled with the territorial court cases in 1828. *American Insurance Co. v. Canter*, 1 Pet. 511, 545. What *Canter* held was that a territorial court, not being ordained and established in accordance with Article III of the Constitution, was "incapable" of receiving a grant of Article III's judicial power. What *Canter* did not decide, however, was the nature of the power being exercised by such courts. Over the years, several different theories have received support in the opinions of this Court. There are cases which hold that territorial courts indeed exercise judicial power, but that the source of that power is Article IV of the Constitution, not Article III.[48] There are other opinions which suggest that these courts always exercised the judicial power of the United States, but were exempt from the tenure limitations of that article

[48] *Williams v. United States*, 289 U.S. 545, 565-566; *O'Donoghue v. United States*, 289 U.S. 516, 535.

by virtue of the temporary status of the territories.[49] And there are opinions which suggest that these courts exercised only legislative power, not judicial power at all.[50] However this interesting debate be settled--and perhaps it is time to accede to Professor Wright's suggestion that "the dubiously conceived notion that courts of the United States can be other than 'constitutional' " be disavowed[51]--these cases have no bearing on the present case. Unlike the courts sitting in the territories, the federal courts in the District of Columbia sit in a constitutionally permanent part of the Union[52] and there is accordingly no local consideration, such as the temporary status of the territories, to justify a departure from the tenure provisions of Article III.

Moreover, aside from *O'Donoghue*, this Court has long recognized the significant difference between the constitutional courts in the District of Columbia and the territorial courts. While the territorial courts are not courts of the United States,[53] the courts of the District of

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[49] *Glidden Co. v. Zdanok*, 370 U.S. 530, 544 (opinion of Harlan, J.). Mr. Justice Harlan pointed out that acceptance of the Article IV theory requires transmogrification of Article IV "judicial power" into Article III judicial power when a case from the territorial courts reaches this Court. Disenchanted with the difficulties of justifying that position, Mr. Justice Harlan suggested that the territorial courts had always exercised Article III judicial power, but had been exempted from that article's tenure requirements due to the impermanent status of the territories.

[50] *Glidden Co. v. Zdanok*, 370 U.S. 539, 599 (dissenting opinion of Douglas, J.).

[51] Wright, *Federal Courts* §11 p. 34 (1971).

[52] See *O'Donoghue v. United States*, 289 U.S. 516.

[53] *E.g., Clinton v. Englebrecht*, 13 Wall. 434; *United States v. McMillan*, 165 U.S. 504.

Columbia are[54] and, like all Article III courts, judgments of the constitutional courts in the District of Columbia are federal judgments within the meaning of the Supremacy Clause of the Constituution.[55] Thus, however the status of the territorial courts is ultimately resolved—and under the holding of *O'Donoghue v. United States, supra,* that issue need not be revisited in this case—the practice in the territories is not justification for disregard of Article III in the District of Columbia.

3. *There Are No Valid District of Columbia Reasons To Override Article III Safeguards*

Each time this Court has been presented with a contention that a particular constitutional safeguard should be denied a litigant because of the unique status of the District of Columbia, the Court has carefully considered whether that constitutional right is so inconsistent with the plenary power of Congress over the District of Columbia that it must give way. *O'Donoghue v. United States,* 289 U.S. 516, 530-535, 538-540; *Downes v. Bidwell,* 182 U.S. 244, 260-261; *Callan v.*

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[54] *E.g., Federal Trade Commission v. Klesner,* 274 U.S. 145, 154; *Benson v. Henkle,* 198 U.S. 1, 13-15; *Cross v. United States,* 145 U.S. 571, 576.

[55] *Embry v. Palmer,* 107 U.S. 3. Similarly, it has long been settled that crimes committed in the District of Columbia are crimes against the United States. *Metropolitan R. Co. v. District of Columbia,* 132 U.S. 1; *Clemmer v. Alexander,* 111 U.S. App. D.C. 189, 295 F.2d 176 (1961); *Gilstrap v. Clemmer,* 284 F.2d 804 (4 Cir. 1960); *Vogel v. Wong,* 178 F.2d 327 (6 Cir. 1949); *Parker v. United States,* 3 F.2d 903 (9 Cir. 1925); *Easterday v. McCarthy,* 256 Fed. 651 (2 Cir. 1919); *Fletcher v. United States,* 42 App. D.C. 53 (1914); *Tyner v. United States,* 23 App. D.C. 53 (1904); *United States v. Manuel,* 126 F. Supp. 618 (D.D.C. 1955); *MacAboy v. Klecka,* 22 F. Supp. 960 (D. Md. 1938).

Wilson, 127 U.S. 540, 550. While it is, of course, unnecessary to reiterate in detail the historical reasons which support the very fundamental safeguards which Article III affords to judge and litigant alike,[56] it is important to observe that these safeguards are as important today as they were when the Constitution was adopted.[57] Moreover, far from there being anything about the District of Columbia that would warrant departure from Article III's command, the District of Columbia, with its geographical proximity to the Congress,[58] calls for those safeguards in a manner even more compelling than would be the case in the several states.[59] While we

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[56] *E.g.*, *The Federalist* Nos. 78, 79 (Lodge ed. 1888) at 489, 491-494; Madison, *Journal of the Federal Convention*, 614-615 (Scott ed., 1893); *O'Donoghue v. United States*, 289 U.S. 516, 530-534; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17; *Evans v. Gore*, 253 U.S. 245, 253.

[57] See, *e.g.*, Metzger, *Why I Am No Longer A Judge*, 177 The Nation 52 (1953); Brown, *The Rent in Our Judicial Armor*, 10 Geo. Wash. L. Rev. 127 (1941). The whole matter of judicial independence was thoroughly aired recently before a committee of the Senate. See *The Independence of Federal Judges, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). See generally, Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665 (1969).

[58] *O'Donoghue v. United States*, 289 U.S. 516, 538-544; Note, *Legislative and Constitutional Courts*, 71 Yale L.J. 979, 1010-1011 (1962); Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 154 n. 149 (1962).

[59] Judges of the local courts who do not enjoy constitutional independence have already been attacked on the floor of the Senate of the United States. *See* 117 Cong. Rec. 14611-14617 (92d Cong., 1st Sess., September 21, 1971) (remarks of Senator Byrd). What effect such attacks have on the local judges cannot, of

think *O'Donoghue v. United States*, 289 U.S. 516, is the authoritative answer to a contention that Article III safeguards are inapplicable to the District of Columbia, review of the legislative history of this statute shows that there is no District of Columbia reason that would warrant depriving litigants and judges in the nation's capital of Article III protections.

The legislative history of the District of Columbia Court Reform Act shows Congress determined to create the local court system as part of a comprehensive legislative assualt on a growing incidence of crime in the District of Columbia. Various reasons for this decision were advanced in the Committee reports.[60]

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course, be ascertained. What is known is that at least one of the local judges has already been subjected to formal disciplinary proceedings instituted by the District of Columbia Commission on Judicial Disabilities and Tenure. See 11 D.C. Code §§1521, *et seq.* (1971). *In re Alexander*, Formal Case No. 1-71 (1972).

[60]The House Committee on the District of Columbia thought a local court system would terminate the "anomaly" of having local matters heard and determined by the United States District Court and the United States Court of Appeals, eliminate the "chaos and confusion" thought to exist between the then-local and federal courts over the nature of certain criminal acts constituting either felonies or misdemeanors and reduce a "soaring crime rate" by providing "swift and sure justice" as a deterrent. H.R. Rep. No. 907, 91st Cong., 2d Sess. at 23, 25 (1970). Similar considerations were advanced by the Senate Committee on the District of Columbia which additionally thought that the establishment of a local court system would ease court congestion and case backlogs. S. Rep. No. 405, 91st Cong., 1st Sess. at 1-3 (1969).

Whether these reasons are good ones or not is, of course, wholly immaterial to the present case, for we readily concede that the power of Congress to "ordain and establish" courts inferior to the Supreme Court of the United States in accordance with Article III is plenary. Appellant's complaint is not that he was tried in a "local" court, but rather that he was tried in a "court" not ordained and established in accordance with Article III.

Although the proposals in the various court reorganization bills introduced in the House and Senate initially called for good behavior tenure (subject to retirement at age 70),[61] the final versions of neither house called for such tenure, and both houses included provisions for a commission with power to hear complaints concerning judicial disabilities and misconduct and to remove judges from office in appropriate cases.[62] The legislative history underlying these provisions shows that the principal concern—repeated time and time again by witnesses and Members of Congress alike and reflected in both the House and Senate Reports—was an alleged need to monitor judicial conduct during an incumbent's service on the bench. A few illustrations from the legislative history of the statute makes the point abundantly clear.

The Committee on the Administration of Justice, appointed in 1966, recommended passage of a bill which

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[61]The Senate proposal, S. 1214, 91st Cong., 1st Sess. at 3, would have provided for tenure during "good behavior subject to mandatory retirement at the age of seventy years." *Hearings on S. 1066 et al. Before the Senate Comm. on the District of Columbia and the Senate Subcom. of the Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 3, at 529 (hereinafter cited as "Senate Hearings"). A similar provision was included in Attorney General Mitchell's recommended legislation introduced as H.R. 13690 and H.R. 12855. *Hearings on H.R. 6034 et al. Before Subcomm. No. 1 of the House Comm. on the District of Columbia*, 91st Cong., 1st Sess., pt. I, at 2, 8-9 (hereinafter cited as "House Hearings").

[62]The final Senate version proposed a four-year "trial" term of office followed by good behavior tenure subject to retirement at age 70. S. Rep. at 8. The final House version, and the version which prevailed, called for ten-year terms of office. H. Rep. at 38. Both versions called for a commission empowered to hear complaints on judicial disabilities or misconduct and to remove judges from office under certain conditions. S. Rep. at 10-11; H. Rep. at 38.

would have combined a judicial nominating commission, a good behavior tenure (subject to retirement at age 70), and a second commission empowered to hear complaints about judges and to remove them from the bench if necessary. S.H. at 612-617. Mr. Ellison, chairman of that committee, explained that these proposals would "accord the local judiciary the same tenure as the federal bench" while "effectively minimiz[ing] any dangers inherent in good behavior tenure." S.H. at 615-616. He further testified that the proposed commission empowered to remove judges from office would "insure[] against the freezing of bad judges into office," "alleviate[] many of the problems involved in retiring a judge who has become disabled due to old age," and "increas[e] the judge's awareness that he must meet reasonable standards of competence and behavior in relation to his office." S.H. at 633. Senator Tydings asked Mr. Ellison to comment on the effect such a removal commission might have on judicial "independence." S.H. at 651. The record shows the following colloquy in response to the inquiry:

> "MR. ELLISON: I think their independence should be invaded in some cases, Mr. Chairman.
>
> "I think that if they live up to their obligations they have nothing to fear. But I think the public does need some protection against some of the judges who are not really competent to handle their job. It is too bad that this offends some men who are not being considered at all in this matter.
>
> "But I think it is one way to correct some of the minor cases, and there are not very many of them, that ought to be taken care of. There may be others here who have something to add to that.
>
> "THE CHAIRMAN [Senator Tydings]: I just wanted to get a statement in the record.

"MR. ELLISON: It does not disturb me very much because I think these judges need to be under some—

"THE CHAIRMAN: Certainly in those States which have the California system, and it has worked very well—

"MR. ELLISON: Very well.

"THE CHAIRMAN (continuing): It has protected the integrity of the bench. It has given the public greater confidence, and we hope we will have a chance of implementing your proposal here." S.H. at 652.[63]

Later in the hearings, Senator Tydings amplified his views on the proposed removal commission:

"The whole concept of a removal commission is not just the removal power, it is the idea of oversight and the responsibility of a judge to some higher authority for his good conduct. The advantage of the California system is that the judges realize they are now accountable and in many, many instances where there have been complaints filed by lawyers, the judges were called in and they knew they were under fire and they straightened up or retired." S.H. at 808.

A similar position was taken by then Deputy Attorney General Kleindienst, who testified that the removal commission would serve as "a constant check on the quality of judicial service." S.H. at 1152.

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[63] Immediately following this colloquy, Mr. Pickering, a member of Mr. Ellison's commission (S.H. at 587), made the astonishing admission that the committee had "not really studied or researched" the removal proposal from the standpoint of Article III's prohibitions. S.H. at 652.

The Senate Report makes it clear that these were the considerations that the Senate had in mind in passing a statute providing for removal of judges by means other than impeachment:

"In drafting the tenure provision of the amended bill, the committee was conscious both of the inexactness of the art of judicial selection and of the importance of tenure in attracting the most competent men to the bench. The committee recognized that the constitutional requirement of "good behavior" tenure has played a significant role in the historic high quality of the Federal bench. On the other hand, the committee was aware that virtually no State has provided such tenure for its judges, an apparent recognition that the opportunity to review the quality of a judge's performance also has its obvious advantages. The committee, therefore, sought a tenure provision that would combine the attractiveness of the federal system with the opportunity for some review of the judge's work.

* * *

"At present, the only means available to rid the local bench of a sick or venal judge is through the process of impeachment by the House of Representatives and trial by the U.S. Senate. To believe that the Congress at this time in our history has the time to police the local judiciary through the impeachment process is just not realistic. That process has not even proven viable when the conduct of Federal, good behavior tenure judges is drawn into question." S. Rep. at 8, 11.

In the House of Representatives, substantially the same considerations were voiced. House Hearings at 69-70, 195-196, 258, 268. The House Report states that the removal commission was "designed to provide a constant

check on the quality of judicial service" and "to remove judges who are found to be guilty of willful misconduct or persistent failure to work, or those who suffer from permanent physical or mental disability incapacitating them for judicial duties." H. Rep. at 38.

At the risk of belaboring the obvious, the reasons advanced by Congress in support of the establishment of non-Article III tribunals in the District of Columbia is dramatic evidence for the need of Article III's safeguards. *O'Donoghue v. United States*, 289 U.S. 516, 530-535. While the arguments advanced in the legislative history may be good reasons for a proposal to amend Article III, they afford no justification for disregard of those fundamental safeguards to judges and litigants in the District of Columbia.

Appellant was unconstitutionally deprived of his right under Article III to have his case heard and determined by a court ordained and established under that article.[64]

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[64] The specific issue raised by this appeal is whether a defendant who has made a pre-trial demand for an Article III court to hear and determine his case, and who has pursued that right at every stage of the direct appeal following conviction, is entitled to relief. There is no occasion to consider here whether a defendant who has acquiesced in a trial before a non-Article III officer, or who has not pursued denial of such a claimed right by appeal, is later able to attack a judgment long since final on Article III grounds. See *Ball v. United States*, 140 U.S. 118; *McDowell v. United States*, 159 U.S. 596, 601-602. *But cf. Glidden Co. v. Zdanok*, 370 U.S. 530. Cf. *Goss v. Mayden*, 450 F.2d 753 (5th Cir.), *cert. granted*, 407 U.S. 920; *Warner v. Flemings*, No. 71-1398 (Oct. T. 1972).

III.

THE EVIDENCE AGAINST APPELLANT WAS OBTAINED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES OF HIS PERSON

In overruling appellant's claim that he was unreasonably seized by police officers in violation of the Fourth Amendment, the court of appeals has held that an officer in the District of Columbia need observe no violation of law nor articulate any reason before he forces a motorist to pull his automobile to the curb and produce for the officer's inspection a driver's permit and motor vehicle registration certificate. If, during the course of such a forcible, selective stop, the officer observes evidence of a crime in "plain view," the court of appeals has held that he may seize that evidence and use it to obtain the motorist's conviction over timely Fourth Amendment objection. We contend that the selective, forcible "spot check" conducted in this case violated appellant's Fourth Amendment protection against unreasonable seizures because: (1) any seizure of an individual made without at least an articulable suspicion of criminal behavior is "unreasonable" under the Fourth Amendment; and (2) the seizure here cannot be sustained on "health and safety" grounds since (a) this was not a "health and safety" seizure at all and (b) even if it were, the Fourth Amendment requires that all selective intrusions, even so-called "health and safety" ones, be subject to minimum "articulable suspicion" standards.[65]

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[65] Since no one can contend that police officers may stop traffic solely to get a "plain view" of "everything that might be inside the car" (A. 37), the court of appeals properly held that the lawfulness of the seizure of the evidence turns on the lawfulness of the seizure of appellant. 290 A.2d at 583-584; A. 66. See *Harris v. United States*, 390 U.S. 234, 236.

A. Appellant Was "Seized" in Violation of the Fourth Amendment

The Fourth Amendment provides protection not only against unreasonable searches but also unreasonable "seizures."[46] *Terry v. Ohio*, 392 U.S. 1; *Davis v. Mississippi*, 394 U.S. 721; *Adams v. Williams*, 407 U.S. 143. A seizure is unreasonable under the Fourth Amendment unless, at a minimum, the police have "specific and articulable facts which, taken together with rational inferences from those facts, warrant that intrusion." *Terry v. Ohio*, *supra*, 392 U.S. at 21. It is conceded and the court below expressly found, that the police officers had no such articulable facts when they seized appellant. 290 A.2d at 581; A. 62.

The *Terry* situation can be divided usefully into three stages: (1) the initial stop; (2) the questioning; (3) the search for weapons. All of these stages are subject to the Fourth Amendment's requirement that the officer

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[46] In this case, it is not a search that is in issue, it is a seizure. Appellant, like the petitioner in *Terry*, complains of an unreasonable "seizure" (*supra*, 392 U.S. at 19). Thus, the cases which treat the issue of valid auto searches (*e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443; *Chambers v. Maroney*, 399 U.S. 42; *Dyke v. Taylor Implement Manufacturing Company*, 391 U.S. 216; *Preston v. United States*, 376 U.S. 364) are not in point. These cases do not turn on the reasonableness of the initial stop of the vehicle and the resulting seizure of the occupant, but rather on the warrant requirements for an ensuing search of the vehicle. Because the search is not here in issue, there is no occasion to re-examine the holding of the *Preston* line of cases in a traffic violation context. *See, e.g.*, *United States v. Robinson*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 23,734, Oct. 31, 1972) (*en banc*); *United States v. Mills*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 22,444, May 10, 1972) (*en banc*).

possess articulable suspicion of criminal activity before he acts. In order to pass from one stage to the next, the initially held suspicion must remain unsatisfied. But in order to start the *Terry* process, the initial seizure must be justified by articulable facts:

> "We, therefore, reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full blown search.'" *Terry v. Ohio, supra,* 392 U.S. at 19.

As *Terry* requires articulable suspicion of actual or potential criminal behavior as the predicate for a valid seizure,[67] so *Sibron v. New York,* 392 U.S. 40, decided the same day, illustrates the constitutional test of adequacy for the claimed articulable facts. *Sibron* holds that a patrolman's surveillance over several hours of an individual in contact with known narcotics addicts did not give rise to "the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." 392 U.S. at 62. *A fortiori,* the officers' momentary observation of appellant—an observation which disclosed only lawful use of the public roads—cannot satisfy Fourth Amendment standards enunciated in *Terry* and *Sibron.* The court below misapprehended these principles when it held:

> "We reject the rigid rule . . . that a police officer may [selectively] stop an automobile . . . *only* when he has articulable suspicion as defined by *Terry*. . . ." 290 A.2d at 582; A. 63.

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[67] The American Law Institute has detailed the Fourth Amendment requirement of articulable suspicion. See, ALI Model Code of Prearraignment Procedure §110.2 and Commentary ¶(6) at 122-23 (1971).

A year after *Terry* and *Sibron* were decided, this Court reaffirmed its holdings that the investigatory stage of a police-citizen encounter is subject to the Fourth Amendment. In *Davis v. Mississippi*, 394 U.S. 721, 724-725, the Court recognized that seizures unchecked by the Fourth Amendment's insistence on reasonable and articulable suspicion would "... subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention." 394 U.S. at 726. By holding that the Fourth Amendment protects a person only after he is seized, not before (290 A.2d at 583, n. 24; A. 64 n. 24), the court of appeals has subjected the motoring public to the very "harassment and ignominy" flatly condemned by *Davis*.[68]

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[68] As this Court has pointedly observed:

> "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530.

The growing nation-wide practice of "spot checks" shows just how well grounded was the Court's worry.

In the District of Columbia, information gathered in a "spot check," including the name, address, nickname, place of employment, and description of the driver, is recorded on an official police department form. See *Gomez v. Wilson*, 323 F. Supp. 87, 90, n. 4 (D.D.C., 1971). In addition, an unofficial form is used by the Special Operations Division on which is recorded

> "... the name, [and] the address of the person driving, the color of the vehicle, the tag number, and the color [and] the number of occupants in [the car]" (A. 35).

The District of Columbia uses the "spot check" device for pedestrians, as well as motorists. *Gomez v. Wilson, supra.*

In Des Moines, Iowa, police conduct filed interrogations similar to the "spot checks" made in Washington, D.C. There, too, data concerning the stopped person's name, age, sex, physical

In its most recent case involving investigatory seizures, *Adams v. Williams*, 407 U.S. 143, 145, this Court noted that the Fourth Amendment permits an "intermediate response" short of full blown probable cause arrest standards for police-citizen street encounters.[69] Reiterating the Fourth Amendment's "articulable suspicion" standard first enunciated in *Terry*, the Court set forth in precise detail the facts available to the officer in Adams' case and concluded that those facts constituted "articulable suspicion," justifying a "reasonable investigatory stop." 407 U.S. at 146.

From this line of cases, it is clear that the street situation offers no exemption from the Fourth Amendment's protection against unreasonable seizures. Indeed, the requirement that seizures be conducted only when an officer possesses articulable suspicion applies when a pedestrian is stopped as he walks down the street,[70] when a parked motorist is questioned by an officer,[71] when a moving vehicle is stopped for an

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description, address, and the detaining officer's reasons for the stop are recorded and cross-indexed on official police department forms. *Loyd v. Douglas*, 313 F. Supp. 1364, 1366 (S.D. Iowa, 1970).

In San Diego, California, a city of 600,000, 200,000 stops are conducted annually. (ALI Model Code of Prearraignment Procedure §110.2 and Commentary ¶4(c) at 114 (1972).)

[69] Of course, as we argued below, if appellant was "arrested" when his automobile was forcibly stopped, see *Henry v. United States*, 361 U.S. 98, "probable cause," not "articulable suspicion," was required.

[70] *Terry v. Ohio*, 392 U.S. 1 (1968); *Loyd v. Douglas*, 313 F. Supp. 1364 (S.D. Iowa, 1970).

[71] *Adams v. Williams*, 407 U.S. 143; *United States v. Wickizer*, ___ F.2d ___ (8 Cir., No. 72-1138, Sept. 13, 1972).

inquiry,[72] or when a moving vehicle is stopped for a license and registration check.[73]

The Fourth Amendment's command that seizures are reasonable only when conducted with articulable suspicion, carefully enunciated in *Terry*, *Sibron*, *Davis*, and *Adams*, went unheeded by the court of appeals. In its place, that court asserted a "health and safety" exception to the Fourth Amendment's requirements. The exception thus created engulfs the entire holding of this Court's cases insofar as Fourth Amendment protection for motorists is concerned. For reasons which follow, we submit that the judgment cannot be sustained on "health and safety" grounds.

B. The "Health and Safety" Rationale Affords No Justification for Departure from Terry-Sibron-Davis-Adams

The court of appeals held that Fourth Amendment protections against selective seizures unsupported by articulable suspicion do not apply to seizures arguably related to public "health and safety." 290 A.2d at 583 n.

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[72] *United States v. Madrill*, 445 F.2d 827 (9th Cir., 1971), *vacated on other grounds*, 404 U.S. 1010; *United States v. Thompson*, 420 F.2d 536 (3d Cir., 1970).

[73] *United States v. Fallon*, 457 F.2d 15 (10th Cir., 1972); *Young v. United States*, 140 U.S. App. D.C. 333, 336-337, 435 F.2d 405, 408-409 (1970); *People v. Mickelson*, 59 Cal.2d 448, 452-454, 380 P.2d 658, 661-662 (1963); *Martinez v. People*, 169 Colo. 366, 368-369, 456 P.2d 275, 277 (1969); *State v. Cobrizzi*, 161 Conn. 371, 288 A.2d 439, 442 (1971), *cert. denied* 464 U.S. 1017 (1972); *Anderson v. State*, 123 Ga. App. 57, 60-61, 179 S.E.2d 286, 288-289 (1970); *People v. Tassone*, 41 Ill.2d 7, 10-11, 241 N.E.2d 419, 421 (1968); *State v. Valstead*, 282 Minn. 301, 310, 165 N.W.2d 19, 25 (1969); *State v. Rankin*, 477 S.W.2d 72, 75 (Mo., 1972). *But see, United States v. Lepinski*, 460 F.2d 234 (10th Cir., 1972); *but cf., United States v. Ware*, 457 F.2d 828 (7th Cir., 1972).

25; A. 65 n. 25. The judgment in this case cannot be supported on "health and safety" grounds for two reasons: (1) this is simply not a "health and safety" case at all and (2) "health and safety" considerations, while arguably justifying a non-discriminating inspection, cannot justify selective seizures of persons absent articulable suspicion.

1. *This Is Not a "Health and Safety" Case*

We do not think there are any "health and safety" considerations involved in this case.[74] A careful reading of the court of appeals' opinion makes it clear that the court authorized police officers to stop automobiles "to investigate some criminal behavior [] related to the

[74] We fail to see the "health" considerations involved in possession of a driver's license and motor vehicle registration certificate, and we see no "safety" consideration with respect to registration certificates. The motor vehicle registration procedure in both the District of Columbia and Virginia is principally a revenue-raising measure (40 D.C. Code §102 (1967); 40 Va. Code §§46.1-149, 167), and merely by observing the visible license plate, a police officer can readily ascertain whether the owner of the vehicle has complied with the registration requirements. Visual inspection of the certificate, as this record clearly shows (A. 25), is designed to ascertain whether the driver of an automobile is authorized by the owner to operate the vehicle "[b]ecause it's--it's a criminal charge if [he's] not" (A. 26). While registration certificates may provide an informal method of ascertaining ownership of a vehicle, that function is not one normally considered a "safety" matter. Yet, it was the registration certificate, not the driver's license, that motivated the officers to seize appellant (A. 21, 34). This is clear, not only from the officers' testimony (A. 21-22, 25-26) but from the conceded fact that having produced a valid driver's license prior to discovery of the gun, appellant was not free to leave until he had satisfied the officers that he was in possession of a valid registration permit (A. 28) and therefore not committing a "criminal offense (A. 26, 41).

possession of a valid license and valid registration." 290 A.2d at 283, n. 24; A. 64, n. 24). On this record, the court could not properly have affirmed appellant's conviction unless it so held, for the police officer testified that his reason for stopping appellant's automobile was to ascertain whether there were grounds for a "criminal charge" of operation an overdue rental car (A. 26).[75]

This case vividly illustrates the hazards of indiscriminate use of the "health and safety" label. Here, what is termed a "routine spot check" for "health and safety" purposes involved two unmarked cars and four plain clothes officers, one of whom immediately stationed himself on the passenger side of the appellant's vehicle "for the protection of [his] partner" (A. 38) and remained in that position looking for "things in the glove compartment that [the appellant] could be charged with" (A. 40-41). See, *supra*, pp. 5-8. In reality, this was a seizure to investigate possible criminal activity related to use of an automobile. To be sure, the officers stopped appellant, at least in part, to inspect his driver's license and registration certificate. But their motivation for this inspection was not to enforce a "health and safety" regulation but rather to see if appellant was committing a crime (A. 26, 40-41). This is absolutely clear, not only from the officers' own testimony, see, *supra*, pp. 6-8, but from the practice of recording on unnumbered forms

> "... the name, [and] the address of the person driving, the color of the vehicle, the tag number, the

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[75] Contrary to the officers' understanding, it is not a crime to operate a rented automobile with an expired agreement in the District of Columbia. *United States v. McLaughlin*, 278 F. Supp. 320 (D.D.C., 1967).

driver's permit number, and the color [and] number of occupants in [the car]" (A. 35).[76]

The space provided in the forms[76] for officers to describe suspicious activity of autos and pedestrians who are detained shows that these "spot checks" are used not to enforce "health and safety" regulations but to detain and interrogate persons whom the police suspect of criminal activity. The officers' testimony shows that, in this case, such was the goal of the "spot check" (A. 25-26, 35-37). In this regard, the "spot check" can be viewed as a descendant of the police investigatory arrest described in a study conducted by a special committee appointed by the Commissioners of the District of Columbia, *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation* (1962). Both "spot checks" and investigatory arrests, by their failure to provide standards that spell out adequate grounds for the seizure of an individual, leave police officers free to halt citizens virtually on whim. *Commissioners' Committee Report, supra,* at 5. The Committee Report, in condemning the practice of investigatory arrests, pointed to the seizure, on clearly unsubstantial grounds, of 6800 persons in the District of Columbia during the two years studied. The impact on each individual seized in an investigatory arrest is severe. However, the adverse impact upon the community of a vastly greater number of investigatory "spot checks" is potent. *Commissioners' Committee Report, supra,* 66-69.[77]

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[76] Official, numbered forms are also prepared and "turned in [and] filed and cross-indexed by name, nickname, stop location, and (for motorists) tag number." *Gomez v. Wilson,* 323 F. Supp. 87, 90, n. 4 (D.D.C., 1971).

[77] The Committee noted that 6800 persons were arrested for investigation during the years 1960-61. Criminal charges were brought against fewer than six per cent of those arrested for

As an eminent jurist has recently observed, one of the hallmarks of this Court has been its willingness to rest "its decisions upon the realities of the situation presented rather than compressing reality into abstract legalism. . . ."[78] The court below invoked an "abstract legalism"—health and safety—without regard to "the realities of the situation presented" by the record. This record, viewed most favorably to the Government,[79]

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investigation. *Commissioners' Committee Report, supra,* at 66-69. By contrast, the "spot check" device is rapidly becoming a nation-wide epidemic involving literally hundreds of thousands of persons. See, *supra,* p. 50, n. 68.

[78] Pahy, *Equal Justice: The Warren Era of the Supreme Court,* 67 Nw.U.L.Rev. 146, 148 (1972).

[79] We do not ask this Court to re-examine the facts. Indeed, although appellant and his witness gave an entirely different account of the circumstances surrounding seizure of the gun, we have limited our argument, both in the courts below and here, to the version of the events given by the police officers. The issue is not what occurred, for we accept the officers' testimony on that score, but the legal conclusions to be drawn from conceded facts.

Where constitutional rights are at stake, this Court is not barred by findings of fact of a state court, *e.g., Whitus v. Georgia,* 385 U.S. 545; *Haynes v. Washington,* 373 U.S. 503, 515-516; *Napue v. Illinois,* 360 U.S. 264, 271-272; *Chambers v. Florida,* 309 U.S. 227, 228-229, particularly where, as here, "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385-386. If, as 28 U.S.C. §1257 now states, the District of Columbia Court of Appeals is to be considered a state court for purposes of review here, these principles are *a fortiori* applicable to a case where, on the Government's version of the facts, the court of appeals has nakedly affixed a "health and safety" conclusion. Even if the court of appeals were to be subject to the standards usually applied when a case comes here from a circuit court, the result would be the same. The trial judge made no formal findings of fact and did not rely on a "health and safety" rationale in overruling appellant's

shows that this is not a "health and safety" case at all. Instead, this case involves a police-citizen encounter motivated by the individual officer's desire to see whether appellant could "prove" that his rental car was not overdue (A. 25-26) and encouraged by the police department's practice of completing official and unofficial forms for filing and cross-indexing (A. 35-36); see, *supra*, pp. 7, 50, n. 68). This Court has already laid down the Fourth Amendment's "articulable suspicion" standard for such an encounter, see, *supra*, pp. 48-52, and it is conceded that this seizure cannot pass muster under that standard (290 A.2d at 581; A. 62). The command of the Fourth Amendment and the holdings of this Court's *Terry-Sibron-Davis-Adams* line of cases cannot be avoided, as the court of appeals sought to do, by the mere incantation of an "abstract legalism" divorced from the record. The judgment must be reversed.

2. *In Any Event, Appellant Was Subjected to an "Unreasonable" "Health and Safety" Seizure*

The court of appeals thought the Fourth Amendment inquiry at an end when it concluded that "health and safety" was at stake. 290 A.2d at 582-583; A. 63-65. This Court's Fourth Amendment jurisprudence flatly rejects that approach. *Camara v. Municipal Court*, 387 U.S. 523, 533-534; *See v. City of Seattle*, 387 U.S. 541.[80] Indeed,

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motion to suppress (A. 41-45). This factor was interjected into the case by the opinion of the court of appeals. Thus, the "two courts below" rule is inapplicable, *Bernenyi v. Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, even if that doctrine might otherwise have relevance to conclusions drawn from uncontested facts where constitutional rights are involved.

[80] That *Camara* and *See* involved searches, and this case a seizure, is immaterial, for the Fourth Amendment bars "unreasonable" seizures as well as "unreasonable" searches. *Terry v. Ohio*, 392 U.S. 1.

the constitutional requirement of "articulable suspicion" for police-citizen street encounters flows directly from *Camara's* holding that salutory reasons for a search or a seizure do not remove conduct from Fourth Amendment scrutiny altogether, although such reasons may justify an "intermediate response" to Fourth Amendment standards of reasonableness. *Terry v. Ohio*, 392 U.S. 1.[81] "Health and safety" considerations, assuming that such exist in this case, are merely factors to be balanced with the fundamental rights protected by the Fourth Amendment in assessing the constitutional reasonableness of a particular intrusion.

Of course, there are obvious safety considerations involved in the operation of automobiles, and we do not contend that driver's license statutes are not related to a valid public safety purpose. Nor do we contend that the Fourth Amendment prohibits *all* police efforts to ensure compliance with licensing statutes.[82] We do contend that the means by which the police seek to achieve this public safety purpose must be carefully balanced against the

[81] See also *Adams v. Williams*, 407 U.S. 143, 145. Even before *Camara*, this Court rejected the notion that a seizure can fall wholly outside the Fourth Amendment protection because of some overriding factor. *Henry v. United States*, 361 U.S. 98, 104.

[82] While, in the abstract, it would seem that "spot checks" for licenses might significantly aid the enforcement of safety laws, empirical studies show that only 1.7 per cent of all motorists drive with revoked or suspended licenses and that a mere .73 per cent of all traffic citations given out are for driving without a valid license. Timberlake, A Study of Procedures Used to Deter Driving While Under Revocation or Suspension, for the Traffic Institute, Northwestern University, 14, 31 (1970). Clearly, the small number of individuals reflected by these figures does not warrant the wholesale abandonment of Fourth Amendment safeguards approved by the court of appeals.

obvious potential of serious Fourth Amendment incursions.

Like most recurring police-citizen situations, the driver's license check had an inauspicious beginning. In 1959, the Florida Supreme Court upheld the use of non-discriminatory and non-selective road blocks designed to ensure compliance with licensing regulations. *City of Miami v. Aronovitz*, 114 So.2d 784, 787 (1959). Clearly recognizing the potentiality of abuse, the court made it clear that selective stops, as opposed to a "systematic check of licenses," would not be permitted. In 1962, Kentucky's highest court made a similar ruling and imposed a similar caveat. *Commonwealth v. Mitchell*, 355 S.W.2d 686, 687 (Ky., 1962). Despite some constitutional objection,[83] the decisions of the Florida and Kentucky courts harmonized the interest in public safety with a citizen's right to be free from unnecessarily intrusive police conduct. In 1966, the court below became the first court to squarely uphold a selective driver's license inspection without requiring that the police officer articulate any reason whatever. *Mincy v. District of Columbia*, 218 A.2d 507 (D.C.C.A., 1966).[84]

Since first approved by the court of appeals in its 1966 *Mincy* holding, selective stops in the District of Columbia have flourished. Stops are now made both of motorists and pedestrians, and formal and informal reports are filed and centrally indexed. See, *supra*, pp. 7, 50, n. 68. This record flatly demonstrates that selective stops for an

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[83] Note, Use of Police Road Block to Inspect Drivers Licenses, 6 Wayne L.Rev. 417 (1960).

[84] Earlier, an Oklahoma court had held such a selective stop violative of the Fourth Amendment unless supported by reasonable cause. *Edwards v. State*, 319 P.2d 1021, 1026 (Okla., 1957).

ostensible safety purpose pose too great a danger to personal freedoms unless subjected to Fourth Amendment safeguards.

We submit that the proper balance between the safety consideration involved in enforcement of the licensing laws and the motorist's right to be free of unreasonable intrusions is that struck by *Camara*, on the one hand, and *Terry*, on the other. Under *Camara*, indiscriminate and uniform methods of checking driver's licenses would, at one and the same time, measurably increase the ability of public officials to enforce the licensing laws[85] while saving motorists against the "harassment and ignominy" incident to involuntary selective stops.[86] Under *Terry*,

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[85] Such periodic, non-discriminatory inspections would doubtless become publicized in a given locality, thus acting as a further deterrent against unlicensed motorists taking to the public streets.

[86] Of course, there may be means other than a road block by which licenses could lawfully be inspected on a non-discriminatory basis. Perhaps police officials, motivated by a dual desire to enforce safety regulations and prevent subordinates from trenching upon Fourth Amendment freedoms, will be able to instruct their officers on other methods by which license inspections can permissibly be made. See McGowan, *Rule Making and the Police*, 70 Mich.L.Rev. 659 (1972). What the Fourth Amendment prohibits, we submit, is a system like that now followed in the District of Columbia where the officer is told to make such stops on any basis he sees fit. See, *supra*, pp. 6, 53-57. That kind of discretion is too dangerous to place in the hands of the policeman on patrol.

Even in a road block situation, or some comparable non-selective inspection procedure, serious Fourth Amendment issues are raised by the practice followed in the District of Columbia of completing official and unofficial police forms and tabulating the information for permanent filing. See, *supra*, pp. 7, 54-55. Such dossier compilations have no place in good faith driver's license inspections.

any motorist for whom a police officer could articulate specific facts warranting a selective stop would also be subject to a driver's license inspection.[87] However, as opposed to the holding of the court below, no motorist can be stopped solely on the whim of a police officer.[88] Thus, even if this was a "health and safety" seizure, it was nonetheless unreasonable and therefore in violation of appellant's Fourth Amendment rights. *Camara v. Municipal Court*, 387 U.S. 523. *See v. City of Seattle*, 387 U.S. 541.

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[87] Curiously, the court below suggests that requiring officers to have articulable suspicion for the initial stop of the auto would result in discrimination against certain groups. (290 A.2d at 582; A. 64). This could only be true to the extent that courts allow membership in such groups to constitute, *pro tanto*, articulable suspicion. If membership in a group, such as those who reasonably appear too young to possess valid licenses, is constitutionally valid "articulable suspicion," there has been no unconstitutional discrimination. On the other hand, the disinterested magistrate or judge who eventually rules on the issue of the adequacy of specific and articulable facts will, of course, reject any asserted facts which impermissibly discriminate against certain groups.

[88] Even before *Camara* and *Terry*, commentators had commended methods such as road blocks as an efficient means of ensuring compliance with licensing laws that was not subject to serious problems of abuse. Comment, *Interference with the Right to Free Movement: Stopping and Search of Automobiles*, 51 Cal.L.Rev. 907 (1963); Constitutional Law—*Use of Police Roadblocks to Inspect Licenses: Commonwealth v. Mitchell*, 37 Conn.B.J. 486 (1963); Note: *The Driver's License "Display" Statute: Problems Arising from Its Application*, 1960 Wash. U.L.Q. 279; McIntyre, *Legality of Stopping a Motorist to Inspect His License or Vehicle*, Highway Safety Research Institute, University of Michigan, *The Enforcement of Traffic Laws: Some Current Legal Problems*, 11 (1967).

CONCLUSION

For the foregoing reasons, the judgment should be reversed and this case should be remanded to the Superior Court of the District of Columbia with instructions to dismiss the indictment for want of jurisdiction. Alternatively, in the event the Court concludes that appellant was not entitled to have his case heard and determined by a court ordained and established in accordance with Article III, the judgment should be reversed and the case remanded for a new trial at which the evidence obtained during an unlawful seizure is excluded.

Respectfully submitted,

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
*Attorney for Appellant**

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*Elizabeth J. Branda, Alan S. Gover, and Lee M. Weisz, students at Georgetown University Law Center but not members of the bar of this Court, assisted in the preparation of this brief.

APPENDIX A

PERTINENT PORTIONS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article I, §8, cl. 17:

"The Congress shall have Power * * * To exercise exclusive Legislation * * * over such District * * * as may * * * become the Seat of the Government of the United States * * *."

Article III, §1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, §2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *.

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CODE

28 U.S.C. §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA CODE

11 D.C. Code §101:

"The judicial power in the District of Columbia is vested in the following courts:

"(1) The following Federal Courts established pursuant to article III of the Constitution:

"(A) The Supreme Court of the United States.

"(B) The United States Court of Appeals for the District of Columbia Circuit.

"(C) The United States District Court for the District of Columbia.

"(2) The following District of Columbia courts established pursuant to article I of the Constitution:

"(A) The District of Columbia Court of Appeals.

"(B) The Superior Court of the District of Columbia."

11 D.C. Code §102:

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code."

11 D.C. Code §721(a):

"The District of Columbia Court of Appeals has jurisdiction of appeals from—

"(1) all final orders and judgments of the Superior Court of the District of Columbia; * * *."

11 D.C. Code §923:

"(a) The Superior Court has jurisdiction over all criminal cases pending in the District of Columbia Court of General Sessions before the effective date of the District of Columbia Court Reorganization Act of 1970.

"(b) (1) Except as provided in paragraph (2), the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia. * * *"

20 D.C. Code §3204:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

40 D.C. Code § 104(a):

"It shall be unlawful–

"(1) for any person to operate any motor vehicle * * * upon any public highway of the District of Columbia * * * if such motor vehicle * * * is not registered * * * or * * * if such person does not have in his possession or in the motor vehicle * * * operated the registration certificate * * *."

40 D.C. Code § 301(c):

"Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor."

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (A. 52-68) is reported at 290 A. 2d 573.

JURISDICTION

The judgment of the District of Columbia Court of Appeals (A. 69) was entered on April 28, 1972. The jurisdictional statement was filed on June 30, 1972. The jurisdiction of this Court was invoked under 28 U.S.C. 1257(2) and alternatively under 28 U.S.C. 1257(3). On October 10, 1972, this Court entered an order (A. 72) postponing probable jurisdiction to the hearing of the case on the merits.

493-701—73——2

QUESTIONS PRESENTED

1. Whether an act of Congress applicable exclusively to the District of Columbia is to be deemed "a statute of any state" within the meaning of 28 U.S.C. 1257(2), so as to authorize an appeal to this Court from a decision of the District of Columbia Court of Appeals sustaining such an act against a constitutional challenge.

2. Whether the local court system established under the District of Columbia Court Reorganization Act of 1970 is governed by Article III of the Constitution, relating to the creation of the federal courts and the tenure of federal judges.

3. Whether the stopping of appellant while he was driving an automobile, for the purpose of inspecting his driver's permit and vehicle registration certificate, constituted an unreasonable seizure in violation of the Fourth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
>
> * * * * * *
>
> [cl. 9] To constitute Tribunals inferior to the Supreme Court;
>
> * * * * * *
>
> [cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Con-

gress, become the Seat of the Government of the United States * * *.

* * * * *

Article III, Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour * * *.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure * * * against unreasonable searches and seizures, shall not be violated * * *.

28 U.S.C. 1257 provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitu-

tion, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Section 11–923(b) of the District of Columbia Code (Supp. IV, 1971) provides in pertinent part:

> * * * the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia.

* * * * *

Section 22–3204 of the District of Columbia Code (1967 ed.) provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person * * * a pistol, without a license therefor issued * * *. Whoever violates this section shall be punished [by fine not exceeding $1,000, or imprisonment for not more than one year, or both] unless the violation occurs after he has been convicted * * * of a felony * * * in which case he shall be sentenced to imprisonment for not more than ten years.

STATEMENT

After a bench trial in the Superior Court of the District of Columbia, appellant[1] was convicted of the felony of carrying an unregistered pistol in the District of Columbia after having previously been convicted of a felony, in violation of D. C. Code § 22–3204. He was sentenced to imprisonment for from two to six years; however, all but six months of the imprisonment was suspended and appellant was placed on probation for six years (A. 1, 50).

The facts surrounding the discovery of the unregistered pistol were fully and accurately stated by the court below as follows (A. 61–62):

> Officers Busker and Morrissette of the Special Operations Division of the Metropolitan Police Department were in plain clothes and an unmarked police car parked on "T" Street when appellant drove by in the early evening of January 16, 1971. Officer Busker knew from the Virginia license tags on appellant's car that the vehicle had been rented. They decided to run a so-called "spot check" to determine if the appellant had a proper license and rental agreement (the equivalent of proper registration). [2] Appellant had committed no moving traffic violation and his auto had no apparent equipment defect.

[1] Whether the appeal in this case is authorized by law is one of the questions before the Court. For the sake of uniformity we shall refer to the defendant below as the "appellant".

[2] Appellant was required to have these documents in his immediate possession while driving in the District of Columbia. D.C. Code (1967 ed.) 40–104(a), 40–301(c).

The officers followed appellant's car as it made an acute angle left turn from "T" Street onto Florida Avenue and then proceeded northwest on Florida for a few blocks until the officers waved appellant to a stop near the corner of Florida and Vermont Avenues. Appellant alighted immediately and met Officer Busker near the left rear area of his car, while the other officer proceeded to the right front area of the auto. Officer Busker asked for and received from appellant his driver's license. However, when asked for the rental agreement for the vehicle, appellant entered the car and retrieved it from the glove compartment. The agreement by its terms had expired on the previous Tuesday, January 12th. Appellant explained (and his story was later verified by the car rental agency) that he had modified the agreement orally prior to its expiration and that, although the written agreement did not so indicate, he was in fact entitled to drive the car by reason of the oral extension of his rental period.

During this conversation between Officer Busker and appellant on the left side of the car, Officer Morrissette was glancing at the interior of the vehicle by means of a flashlight. He testified at trial that his presence in that position and his use of the flashlight were standard operating procedure to protect the safety of the other officer who was endangered by the possibility that the driver, retrieving

> something from his car, might pull out a weapon and assault the officers. Officer Morrissette then noticed the trigger mechanism of a pistol protruding out from beneath the armrest on the front of appellant's car. He removed the pistol from appellant's auto and, after learning that it was unregistered, placed appellant under arrest * * *. [Original footnotes and citation omitted.]

Jurisdiction over appellant's prosecution, and over other criminal cases under any law applicable exclusively to the District of Columbia, was conferred on the Superior Court by Congress in the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473, *et seq.* See D.C. Code § 11-923(b). Judges of the Superior Court are appointed by the President and serve for terms of fifteen years. D.C. Code §§ 11-1501(a), 11-1502. Prior to trial, appellant moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction to try him for a felony; his claim was that only a court whose judges serve during their "good Behaviour" may constitutionally exercise jurisdiction over a felony prosecution under the District of Columbia Code. He also moved to suppress the pistol on the ground that it was discovered as the result of an unlawful search. Both motions were denied. The District of Columbia Court of Appeals affirmed the conviction (A. 52-69), and this appeal followed.

SUMMARY OF ARGUMENT

I

The judgment below sustained the constitutionality of the provision of the District of Columbia Superior Court Reorganization Act of 1970 that conferred jurisdiction on the new District of Columbia Superior Court over all criminal cases arising "under any law applicable exclusively to the District of Columbia." This raises the question whether a congressional enactment applicable exclusively to the District of Columbia, such as the provision upheld below, is a statute of a state or of the United States for purposes of this Court's jurisdiction under 28 U.S.C. 1257. If such enactment is a state statute, appeal from the judgment below would be a matter of right; if it is a statute of the United States, however, this case lies only within the certiorari jurisdiction of this Court.

The statute upheld below was enacted by Congress into the District of Columbia Code and thus in a sense is a statute of the District of Columbia. However, this Court has repeatedly held that the District of Columbia is not a "state" for jurisdictional purposes. Moreover, the Court Reorganization Act was passed by Congress and signed by the President and therefore is, at least in common parlance, a statute of the United States rather than of a "state." And when Congress has intended its enactments of exclusively local application to be treated as state statutes for jurisdictional purposes, it has stated that intention expressly. See 28 U.S.C. 1363. Indeed, Congress

amended Section 1257 to provide expressly that the District of Columbia Court of Appeals should be considered as the "highest court of a State" for purposes of review under that Section but did not provide that acts of Congress applicable exclusively to the District of Columbia should be treated as "statutes of a state" for these purposes.

Furthermore, treatment of such congressional enactments as "statutes of the United States" for purposes of 28 U.S.C. 1257 comports with the principles of federalism and comity which underlie the statutory pattern set for this Court's review jurisdiction. That pattern represents a determination by Congress that a final judgment invalidating one of its enactments—which it deems presumptively constitutional—should be that of a federal court; Congress established the courts below to act as the functional equivalents not of federal courts but of state courts; but review as of right over decisions by the court below invalidating local acts of Congress depends, under the present statutory scheme, upon those acts being regarded as statutes of the United States. Conversely, Congress has not considered it appropriate to provide appeals as of right from the judgments of state and federal appellate courts sustaining its own enactments; review of judgments by such courts sustaining congressional enactments lies only within the certiorari jurisdiction of this Court; and there is no reason to believe that review as of right of similar judgments by the District of Columbia Court of Appeals was deemed by Congress to be uniquely necessary.

493-701—78——3

II

The judges of the local District of Columbia courts established by the Court Reorganization Act have limited tenure. Thus these courts are non-Article III "legislative" courts. The principal question raised by appellant is whether such legislative courts may constitutionally exercise jurisdiction over prosecutions of local District of Columbia felony offenses.

Appellant's contention that the courts below lacked constitutional jurisdiction to try his case is grounded in the argument that non-Article III courts may not try inherently judicial matters arising under the laws of the United States. But this argument is fundamentally mistaken. It is commonplace for state courts, which by definition are non-Article III courts, to exercise judicial power over cases arising under the laws of the United States. Their constitutional jurisdiction extends to both federal remedial and penal statutes. And in the nineteenth century state courts tried federal prosecutions as well.

It is well established that Congress may create legislative courts which are not subject to the Article III restrictions on tenure. Pursuant to this authority Congress has in the past established legislative courts for the adjudication of causes arising in federal enclaves, including the District of Columbia, and also for the resolution of a variety of matters peculiarly within the congressional domain.

Legislative courts, like state courts and courts ordained under Article III, can exercise jurisdiction over cases arising under the laws of the United States,

and this jurisdiction has long embraced "inherently judicial" matters. For example, the legislative courts in federal territories have always been courts of general jurisdiction, capable of trying a wide-ranging assortment of judicial matters, including criminal prosecutions. Thus, in the most complete sense, legislative courts exercise "judicial power."

Article I, Section 8, clause 17, of the Constitution grants Congress plenary power over the District of Columbia. This power naturally embraces the establishment of a court system for the adjudication of local disputes. Congress may establish non-Article III courts for federal enclaves and it has historically established such courts for the determination of minor non-federal causes in the District of Columbia. Moreover, there are substantial reasons why the local courts of the District of Columbia and the federal courts should have different constitutional identities. The federal judiciary was established to serve national purposes as a system of national tribunals. It was not intended that a local court system, designed to meet the ordinary adjudicative needs of persons residing or doing business in the District of Columbia, would be an integral part of that national judiciary. To the contrary, the need for flexibility in local administration and other practicalities of local government in the District of Columbia militate in favor of limited tenure for local judges. Nothing in this Court's decision in *O'Donoghue* v. *United States,* 289 U.S. 516, bars creation of a legislative court system of local subject-matter jurisdiction for the District of Columbia.

There is no constitutional ground for excluding local felony prosecutions from the jurisdiction of local legislative courts for the District of Columbia. Such courts have exercised jurisdiction over misdemeanors and petty offenses since 1801. And there is no distinction between misdemeanor and felony prosecutions constitutionally relevant to the assertion of jurisdiction. The nature of both proceedings involves the exercise of true judicial power.

III

Appellant's final contention is that the selective stop of his automobile for the purpose of inspecting his driving permit and vehicle registration certificate constituted an unreasonable seizure. But the District of Columbia, in common with most states, requires the operator of an automobile to have both permit and registration certificate in his possession, and selective stops are lawful and necessary in enforcing such statutes.

Thus this case differs fundamentally from *Terry* v. *Ohio*, 392 U.S. 1. Unlike an automobile driver, a pedestrian does not exercise a licensed privilege by walking, and it is therefore reasonable to require police to have a specific basis for detaining him against his will. But the operator of an automobile engaging in a regulated activity can have no reasonable expectation of privacy concerning disclosure of his driving permit and registration certificate. Moreover, unlike a search of the person, a spot check for compliance with motor vehicle regulations cannot reasonably be said to involve any indignity or personal affront.

Although appellant suggests that such inspections must be limited to road blocks and may not be selective, there appears to be no constitutional basis for that suggestion. The relative effectiveness of different inspection techniques is a matter appropriately left to the discretion of local officials and such officials may reasonably conclude that if permit and registration inspections are to be effective and serve as a credible deterrent, they must be selective and unannounced.

ARGUMENT

I. REVIEW BY THIS COURT OF A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS UPHOLDING AN ACT OF CONGRESS IS BY CERTIORARI, NOT BY APPEAL

In its order setting this case for argument, this Court postponed the question of jurisdiction until the hearing of the case on the merits. The question is whether there is statutory basis for an appeal to this Court or whether appellant's papers should be treated as a petition for a writ of certiorari.

Section 1257 of the Judicial Code, 28 U.S.C., defines the jurisdiction of this Court to review final judgments of the highest courts of the several states and of the District of Columbia Court of Appeals. In relevant part, Section 1257(2) provides that a final judgment upholding the validity of "a statute of any state" against a claim that it is repugnant to the Constitution may be reviewed on appeal. It is on that subsection that appellant relies in contending that his challenge to the constitutionality of an act of Congress is properly here on appeal. It is the government's

position that review lies only by writ of certiorari under Section 1257(3), since the act whose validity has been drawn into question is a "statute of the United States" and not "a statue of any state" within the proper construction of Section 1257(2).

The court below upheld the validity of a provision of the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473, *et seq.*, against constitutional challenge. The provision in question, Section 111 of the Act, 84 Stat. 486 (D.C. Code § 11-923(b)), confers jurisdiction on the District of Columbia Superior Court over all criminal cases arising "under any law applicable exclusively to the District of Columbia." This provision is itself a statute "applicable exclusively to the District of Columbia." The jurisdictional issue thus presented is whether a statutory provision enacted by Congress but having only local applicability to the District of Columbia is a statute of a "state" or of "the United States" within the meaning of Section 1257.[*] The resolution of this issue will affect the Court's future dockets, for it may be anticipated that a significant portion of the caseload of the District of Columbia Court of Appeals will involve such "local" statutes.

On its face, of course, the language of Section 1257 makes this a certiorari case rather than an appeal

[*] The act of Congress here in question, the Court Reorganization Act, is not in its entirety applicable exclusively to the District of Columbia, for in addition to amending the District of Columbia Code it also amended, *inter alia*, several provisions of the Federal Judicial Code. See Section 172 of the Act, 84 Stat. 590.

case, and there are substantial reasons not to strain the language of Congress to expand the scope of the Court's obligatory jurisdiction.[*] While the challenged provision of the Court Reorganization Act applies only to the District of Columbia, the Act was passed by Congress and signed by the President and is therefore, within the ordinary meaning of the words, a "statute of the United States" rather than of "any state." Cf. *United States* v. *Vuitch*, 402 U.S. 62, 64–67 (holding that a criminal provision of the District of Columbia Code, applicable only in the District of Columbia, was an act of Congress included within the term "statute" for purposes of direct review under the Criminal Appeals Act, 18 U.S.C. (1964 ed.) 3731, *et seq.*). See also *District of Columbia* v. *Gannon*, 130 U.S. 227. Although the challenged statute was enacted into the District of Columbia Code, and in that sense may be a law of the District of Columbia, it is nevertheless not the "statute of any state." Indeed, on the merits of his Article III claim, appellant himself relies (Br. 22–24) on the fact that the criminal statute he violated is a "law of the United States," even though it applies only in the District of Columbia. And that statute, D.C. Code § 22–3204, is a law of the United States only because, like the provision of the Court Reorganization Act here in question, it is a statute enacted by Congress.

This Court has repeatedly held, with respect to related questions, that the District of Columbia is not

[*] See Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 36–38 (1972).

a "state" for jurisdictional purposes. *District of Columbia* v. *Carter*, No. 71–564, decided January 10, 1973; *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582; *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445. In the absence of compelling considerations militating toward a contrary interpretation, not present here, this Court should read Section 1257 in accordance with the terms used by Congress and hold that for purposes of that Section a statute which, like the provision here in question, is enacted by Congress is a statute of the United States and not of a "state," whether or not it is a statute of local application only.[4]

Appellant notes (Br. 16) that "[t]he entire thrust of [the] reorganization [of the District of Columbia court system] was to create a dual system of courts in the District of Columbia akin to the state-federal court systems existing in the several states" and argues (Br. 16–17) that, despite the literal language of Section 1257, the Congressional purpose would be furthered, at least as a purely formal matter, by treating congressional enactments of exclusively local application as state statutes for purposes of that section.

[4] The mixed local-federal nature of many congressional enactments applicable primarily to the District of Columbia further argues against the arbitrary classification of statutory provisions applicable exclusively to the District of Columbia as "state" statutes. As has been stated (note 8, *supra*), the Court Reorganization Act itself was of such a hybrid nature. But Section 1257 affords no basis for treating one portion of an act as a statute of a state, and another as a statute of the United States, for purposes of review by this Court.

But that determination was for Congress to make, and it did not do so. There is little reason to impute such a design to Congress in the absence of a specific direction that some of its statutes should be regarded as "state" statutes for purposes of appellate review. In amending Section 1257 to provide for review by this Court of the judgments of the court below, Congress expressly provided that that court is to be treated as "the highest court of a State," while at the same time refraining from treating acts of Congress applicable exclusively to the District of Columbia as "statute[s] of any state." In other provisions of the Court Reorganization Act, Congress showed that, when it intended that its statutes of exclusively local application should be treated as the statutes of a state, it could make that result explicit. Thus, Congress amended the Judicial Code to provide that, for purposes of statutes defining the jurisdiction of the federal district courts, laws applicable exclusively to the District of Columbia should not be considered "laws of the United States" or "Acts of Congress." See Section 172(c)(1) of the Act, adding 28 U.S.C. 1363. The fact that Congress abstained from specifying that result under Section 1257 is therefore not without significance.

Moreover, as this Court has recently observed, "[w]hether the District of Columbia constitutes a State * * * within the meaning of any particular statutory * * * provision depends upon the character and aim of the specific provision * * *." *District of Columbia* v. *Carter, supra,* slip op. 2–3. The treat-

ment of congressional enactments for the District of Columbia as statutes of the United States, rather than of a state, for purposes of review by this Court under Section 1257 of the Judicial Code promotes both the policy of that section and the aims of the appeal-certiorari distinctions drawn for review of decisions of federal courts of appeals and of state courts, respectively, by Sections 1254 and 1257 of the Judicial Code. These distinctions reflect basic principles of federalism and comity as implemented by the Supremacy Clause of Article VI of the Constitution.

The review provisions represent at least in part a determination by Congress that a final judgment invalidating one of its statutes—which it deems presumptively constitutional—should be the judgment of a federal court.[8] But as appellant recognizes (Br. 16), Congress established the District of Columbia courts

[8] The distinction between mandatory and permissive review is based on this principle. Thus, a judgment by a federal court of appeals invalidating a statute of the United States is reviewable by this Court only on a writ of certiorari, but there is an appeal as of right to this Court for review of a similar judgment by the highest court of a state. See 28 U.S.C. 1254(1), 1257(1). Conversely, similar principles of federalism and comity explain why decisions involving "state" statutes are reviewable by different modes. If a federal court of appeals invalidates a state statute on federal constitutional grounds, an appeal as of right lies to this Court as the arbiter of the federal system. 28 U.S.C. 1254(2). If a state court, however, invalidates a state statute on such grounds, further review by this Court is a matter of discretion. 28 U.S.C. 1257(3). But if the state court upholds one of its statutes against federal constitutional challenge, an appeal lies to this Court to insure that the state enactment accords with the federal constitution. 28 U.S.C. 1257(2).

to act as the functional equivalents not of federal courts but of state courts. These courts were established as local courts for the adjudication of primarily local, nonfederal issues and thus serve an essentially "state" function in our federal system. Therefore a judgment by the court below *invalidating* an act of Congress would be equivalent to a state court judgment from which appeal as of right is appropriate. But acts of Congress, whether of local or national application, are still the legislative enactments of the federal government. To preserve an appeal as of right from the judgment of an essentially "state" court invalidating any congressional enactment under Section 1257, all such enactments must be treated as statutes of the United States.

Similarly, Congress has not provided an appeal as of right from the judgments of state courts, or of federal courts of appeals, sustaining its own enactments. See 28 U.S.C. 1254 and 1257. Yet appellant's reading of Section 1257(2) would mean that Congress so mistrusted its own enactments for the District of Columbia that it believed review by this Court should be mandatory when they are *sustained*. The result of this construction urged by appellant would be that the only time an appellate judgment *sustaining* an act of Congress would be reviewable on appeal to this Court would be from a decision of the District of Columbia Court of Appeals. There is no basis in principles of federalism or comity, and nothing in the legislative history of the Court Reorganization Act, to suggest

that Congress saw any need to create a unique right to review of the decisions of the new "state" court upholding its acts.

A literal reading of Section 1257—construing all congressional enactments to be statutes of the United States—comports with existing congressional policies with respect to this Court's review jurisdiction. By contrast, appellant's reading, which severely twists the plain language of Section 1257, serves none of the policies that have been manifested by Congress in defining this Court's appellate jurisdiction.* If appellant is correct in treating acts of Congress of local application as "state" statutes, the result would be extraordinary in light of the other statutory review provisions: there would be an appeal as of right to this Court when such statutes are upheld as constitutional (28 U.S.C. 1257(2)) but not when they are struck down (28 U.S.C. 1257(1) and (3)). But treating such statutes as statutes of the United States pre-

* Appellant contends, at least by implication (Br. 17–18), that if an appeal as of right is not available in cases upholding statutes applicable only to the District of Columbia, no litigant in the District of Columbia Court of Appeals will ever be able to bring an appeal as of right to this Court under Section 1257(2). While the pertinence of this argument is questionable, it overlooks the fact that Section 1257(2) refers to "a statute of any state"; the court below may be called upon to examine the validity of a statute of one of the fifty states that affects the interests of litigants before it. A judgment of a state court upholding a statute of another state against a claim that it conflicted with federal law would raise an issue under the Supremacy Clause (Article VI, clause 2) of the Constitution; such an issue should be resolved by this Court in the last instance. Hence review of

serves the congressional policies inherent in the existing symmetry of the statutory pattern.'

Accordingly, the Court should treat the papers on which this appeal was taken as a petition for a writ of certiorari and determine as a matter of discretion whether to decide the issues raised on the merits. See 28 U.S.C. 2103.

II. THE DISTRICT OF COLUMBIA COURTS ESTABLISHED UNDER THE 1970 COURT REORGANIZATION ACT MAY EXERCISE JURISDICTION OVER LOCAL FELONY PROSECUTIONS

A. INTRODUCTION: THE DISTRICT OF COLUMBIA COURT SYSTEM

This case involves a constitutional challenge to the validity of the establishment of the courts of the District of Columbia. In enacting the District of Colum-

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such judgments by appeal is appropriate and is provided by Section 1257(2). See *Young* v. *Masci*, 289 U.S. 253. But a similar judgment upholding a congressional enactment of exclusively local application does not implicate Supremacy Clause values. Thus review of such judgments may appropriately be restricted, as we believe Congress has done in Section 1257(3), to this Court's certiorari jurisdiction.

'Appellant suggests that *Balzac* v. *Porto Rico*, 258 U.S. 298, supports his position. But the statute of local application challenged there was enacted not by Congress but by the territorial legislature; it was therefore not a statute of the United States and the only issue presented was whether an enactment by the territorial legislature was a "statute of [a] state" for purposes of the federal review statute. This Court held that such an enactment was a state statute for these purposes. The reasoning of that decision apparently was abandoned in *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1. But the result in *Balzac*, now codified in 28 U.S.C. 1258(2), granting review as of right from judgments upholding territorial laws against claims of conflict with federal law, may be rationalized on Supremacy Clause grounds. See notes 5 and 6, *supra*. No similar argument is available to petitioner here.

bia Court Reorganization Act of 1970, Pub. L. 91–358, 84 Stat. 473, *et seq.*, Congress comprehensively restructured the court system of the District.[8] Before passage of that Act, the local court system in the District of Columbia had consisted of one trial court with limited jurisdiction over general categories of cases, known as the District of Columbia Court of General Sessions; two trial courts of special jurisdiction, the Juvenile Court of the District of Columbia and the District of Columbia Tax Court; and one appellate court, the District of Columbia Court of Appeals, whose judgments were subject to review by the United States Court of Appeals for the District of Columbia Circuit. D.C. Code (1967 ed.) §§ 11–321, 11–701, 11–901, 11–1501, 40–603–1.

Prior to the 1970 Act, the criminal jurisdiction of the Court of General Sessions was restricted to misdemeanors and petty offenses. D.C. Code (1967 ed.) § 11–963. Its civil jurisdiction extended only to civil actions involving not more than $10,000 and did not embrace actions involving title to real estate. D.C. Code (1967 ed.) § 11–961. Cases arising under local District of Columbia law which were not cognizable in the local court system, including felony prosecutions for violations of the District of Columbia Code, were tried in the United States District Court for the District of Columbia. See D.C. Code (1967 ed.) § 11–521. And the federal district court had concurrent juris-

[8] For a thorough review of that Act, see Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L.J. 477 (1971).

diction over most of the criminal and civil matters cognizable in the local courts. D.C. Code (1967 ed.) §§ 11–521, 11–522, 11–523.

As a consequence of its broad jurisdiction over purely local matters, the federal district court had accumulated a large backlog of pending criminal cases, evoking widespread concern over "the profound adverse effect of congestion and delay on the administration of justice." S. Rep. No. 91–405, 91st Cong., 1st Sess., p. 3. Noting "the anomaly inherent in burdening a Federal district court with sole jurisdiction over the full panoply of local legal matters" (*ibid.*), the Senate Committee on the District of Columbia summarized the problem faced by the district court in the following terms (*ibid.*):

> The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nationwide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capital have been assigned full time to the trial of local felony offenses.

It was to remedy this situation that the Court Reorganization Act was passed. The Act consolidated the local trial courts into a new court of general local

jurisdiction, the Superior Court of the District of Columbia. See Section 111 of the Act, 84 Stat. 482; D.C. Code § 11–901. The Superior Court was given jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia" (Section 111 of the Act, 84 Stat. 486; D.C. Code § 11–923(b)) and, with the exception of matters over which exclusive jurisdiction is vested in a federal court, "of any civil action or other matter (at law or in equity) brought in the District of Columbia" (Section 111 of the Act, 84 Stat. 484; D.C. Code § 11–921(a)).[8]

At the same time, the Act eliminated the federal district court's special jurisdiction over local civil matters and reduced its jurisdiction over local criminal offenses to prosecutions involving a federal (United States Code) offense. See Section 111 of the Act, 84 Stat. 476, 477; D.C. Code §§ 11–501, 11–502. The former appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit over the judgments of the District of Columbia Court of Appeals, with only a minor exception, was also eliminated (Section 111 of the Act, 84 Stat. 476; D.C. Code § 11–301) and the District of Columbia Court of Appeals was declared to be the "highest court of the District of Columbia," whose judgments are reviewable directly by this Court (Section 111 of the Act, 84 Stat. 475; D.C. Code § 11–102).

Thus the Act transformed the court system of the District of Columbia into two distinct and parallel

[8] The jurisdictional changes brought about by the Act were made effective in stages over the course of a transitional period.

structures of local and federal courts, each operating within its own sphere of pertinent jurisdiction, similar to the traditional division between state and federal court systems existing in the states. In addition to increasing the responsibilities of the local judiciary, the Act lengthened the judges' tenure, from 10 to 15 years, and raised their salaries. Section 111 of the Act, 84 Stat. 479, 482, 491; D.C. Code §§ 11–703, 11–904, 11–1502. See H. Rept. No. 91–907, 91st Cong., 2d Sess., pp. 37–39. It is the limited tenure provision that is at the heart of appellant's claim that he could not constitutionally be tried before the District of Columbia Superior Court.

B. CASES ARISING UNDER THE LAWS OF THE UNITED STATES NEED NOT BE TRIED IN COURTS CREATED UNDER ARTICLE III OF THE CONSTITUTION OR EXERCISING THE JUDICIAL POWER OF THE UNITED STATES

Article III, section 1 of the Constitution establishes the framework for the Judicial Branch of the national government. It provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Judges of these courts are to hold office during their good behaviour. The Article then states that this "judicial Power shall extend" to various classes of cases, including those "arising under * * * the Laws of the United States" (Article III, section 2). The issue appellant raises about the validity of the court that tried him could fairly be formulated as follows: Must every case involving enforcement of an act of Congress be tried in a fed-

eral court established under Article III? Appellant's position on this question (which he casts in somewhat different terms) rests upon several fundamental misconceptions which are for the most part assumed rather than argued. We shall endeavor to show below that, when these misconceptions are removed, there remains no constitutional impediment to the congressional decision to allow "local" criminal cases to be prosecuted in the courts of the District of Columbia, even though these courts are not established under, or in conformity with, Article III of the Constitution.

These misconceptions, briefly, are as follows: That Congress must confer all of the potential jurisdiction to which the "judicial Power of the United States extends" on national courts created under Article III; that any court entertaining or adjudicating a case arising under the laws of the United States must be exercising the judicial power of the United States; and that violations of criminal statutes enacted by Congress form a distinct class of cases for Article III purposes. We shall contend, on the contrary, that Congress had no obligation to create a national judiciary; that cases arising under the laws of the United States—civil and criminal—may be adjudicated by state courts and other non-Article III courts; and that courts entertaining such cases are not thereby exercising the "judicial Power of the United States" within the meaning of Article III and are thus not governed by its qualifications. And, more specifically, we shall show that, in limited situations, Congress has power to create courts exercising judicial power without giv-

ing such courts the status of Article III courts; that Congress' plenary power over the District of Columbia authorizes creation of a non-Article III court system for "local" matters; and that felony prosecutions may be entertained by these courts.

Appellant contends that the terms of Article III require that his prosecution for a felony proscribed by an act of Congress take place before a judge with life tenure. Although he makes no attempt to discuss the implications of his position, there is little support for his assertion that a *felony statute* is in a special category for purposes of Article III. Nothing in that Article distinguishes in its reach and effect between civil and criminal cases or between different levels of criminal cases. Thus, appellant's arguments about the lack of constitutional power to authorize enforcement of acts of Congress in non-Article III courts must apply equally to civil claims under such acts.

In any event, the principal defect in appellant's position lies in his assumptions that, because Article III says that federal judicial power "extends" to all cases arising under the laws of the United States, Congress must vest such federal power in courts established under that Article and must do so exclusively. But these assumptions are not supported by the text of Article III or by constitutional history. Article III reflects the compromise solution reached at the Constitutional Convention of 1787 between proponents of a strong central government with an independent court system and the opponents of such a development. The decision was made to provide for a Supreme Court

but to *authorize* Congress to create an "inferior" federal judiciary without requiring that it do so." It was the explicit expectation of the Framers that a system of *inferior* federal courts might not be established. Indeed, although the First Congress did establish a national court system, there was no attempt to vest in the new federal courts all of the jurisdiction to which Article III says the federal judicial power "extends." The classes of cases to be entertained in federal courts were limited. Instead, as had been expected (see Hamilton, *The Federalist No. 82*), "Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwicker* v. *Koota*, 389 U.S. 241, 245. It was not until 1875 that Congress finally conferred general "federal question" jurisdiction on the federal courts to entertain all cases arising under the laws of the United States, and even then state courts retained concurrent jurisdiction over all of these cases and had exclusive jurisdiction (as they still do) in cases not satisfying the minimum jurisdictional amount. See Act of March 3, 1875, C. 137, 18 Stat. 470; *District of Columbia* v. *Carter*, No. 71-504, decided January 10, 1973, slip op. 10, n. 20.

Thus, for nearly a century, as the Framers anticipated, cases "arising under * * * the Laws of the United States" (with limited exceptions) *had* to be adjudicated in non-Article III courts—the courts of the several states—subject of course to ultimate review by

[10] See Hart & Wechsler, *The Federal Courts and the Federal System*, 17–18 (1953), summarizing the debates of the Convention.

this Court, whose establishment was mandated by Article III."

Constitutional history also shows that there is no support for the distinction appellant implies, but does not argue or support, between civil and criminal cases, for the enforcement of acts of Congress in non-Article III courts has not been confined to civil matters alone. From at least 1794 Congress has provided for enforcement of fines, penalties, and forfeitures under federal statutes in state courts. See Charles Warren's extensive survey in *Federal Criminal Laws and the State Courts,* 38 Harv. L. Rev. 545, 551–553, 570–572 (1925). As early as 1799 Congress provided for prosecution of criminal offenses against the federal postal laws in state courts of competent jurisdiction. See Act of March 2, 1799, c. 43, § 28, 1 Stat. 733, 740. Punishment for these offenses, including embezzlement and robbery, could be up to ten years' imprisonment or, for a second offense, death. See Sections 14, 15 and 20 of that Act. Under statutes like these, the United States actually prosecuted criminal cases in state courts. See Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 54–55 (1924).

The constitutional authority to enforce federal penal statutes in non-Article III courts of the states is unquestionable. Although undeniably involving the assertion of judicial power over "cases arising under

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" See Hart & Wechsler, *supra,* at 18, 418–420; Section 25 of the Judiciary Act of 1789, 1 Stat. 85; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cohens* v. *Virginia,* 6 Wheat. 264,

the laws of the United States," this Court has never considered Article III violated by such enforcement. See generally *Claflin* v. *Houseman*, 93 U.S. 130; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230. Indeed, in *Testa* v. *Katt*, 330 U.S. 386, after reviewing some of the constitutional history we have briefly discussed involving congressional grants of authority to state courts to entertain prosecutions for "federal crimes" (330 U.S. at 390), a unanimous Court held that Congress can constitutionally require "state courts to enforce federal penal laws" (330 U.S. at 391).[12]

C. CONGRESS CAN ESTABLISH COURTS THAT DO NOT HAVE THE ATTRIBUTES OF "INFERIOR FEDERAL COURTS" CREATED UNDER ARTICLE III

In light of the settled practice of allowing cases arising under the laws of the United States to be heard and determined in state courts, whose judges typically do not serve for life and who do not exercise the "Judicial Power of the United States" under Article III, Section 1, it is not surprising that Congress itself has long been held to be able to establish non-Article III courts for specific purposes. Appellant ar-

[12] It was suggested by two of the most distinguished commentators on federal jurisdiction that the state courts could be granted jurisdiction to try federal prosecutions involving "* * * illicit dealings in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, * * * and like offenses * * *." Frankfurter and Landis, *The Business of the Supreme Court* 293 (1928). See also Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 Harv. L. Rev. 966 (1947).

gues that, except for the federal courts under Article III, the other entities the Congress has established and called "courts" have exercised "legislative" or "executive" power, rather than "judicial power" (Br. 24–27); but this contention does not withstand analysis. Historical practice and clear precedent show that Congress has power, apart from Article III, to establish courts that exercise judicial power, even though their judges serve for fixed terms.

Article III relates to the definition of the third branch of the national government—the vigorously debated "national judiciary" whose very existence, except for this Court, the Framers left to congressional discretion. The Framers were concerned about the character of such an ambitious system of national courts and they worked to assure the prospective incumbents a measure of security and independence. But these basic constitutional judgments did not apply to courts of special and limited function that Congress might create for other purposes. These courts are called "legislative" courts—not because, as petitioner seems to imply (Br. 25–26), they exercise merely "legislative" responsibilities, but because their creation is traceable to the exercise of legislative power under Article I unrelated to the organic provisions of Article III. Legislative courts need not share the attributes of Article III courts, such as tenure and salary. Despite appellant's argument, the authority to establish these courts is not based on a notion that they are exercising something other than "judicial power." On the con-

trary, they are courts in every sense, just as are the courts of the states that do not follow the Article III model. "Legislative" courts are not bound by Article III for the simple reason that they are not part of the national judiciary that Article III authorized. They are not, in that sense, exercising the "judicial Power of the United States"; as the history of state court enforcement of federal law vividly demonstrates, the mere fact that a court is enforcing a law of the United States does not mean that that court is exercising the "judicial Power of the United States" for purposes of Article III.

1. Congress May Establish Legislative Courts Not Subject to Article III Restrictions on Tenure

Article III, Section 1, of the Constitution provides that the judicial power of the United States is vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time * * * establish" and that the judges of such courts "shall hold their Offices during good Behaviour." [12] This provision is complemented by Article I, Section 8, clause 9, which grants Congress the power "[t]o constitute Tribunals inferior to the supreme Court." The jurisdiction of such courts is limited by Article III, Section 2. See *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582. And the judges of the courts established

[12] Article III, Section 1 also provides that the salaries of such judges shall be undiminished during their continuance in office. The posture of this case is such that this additional guarantee need not be discussed separately.

by Congress pursuant to Article I, Section 8, clause 9, enjoy the tenure prescribed by Article III, Section 1.

It has been recognized since at least 1828, however, that Congress, in the exercise of other powers, may establish courts whose judges do not possess the "good behaviour" tenure afforded by Article III and who exercise judicial power that is authorized under Article I and not derived from the grant of jurisdiction in Article III. *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546. See generally, Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 137–138 (1962). As this Court noted in *Ex parte Bakelite Corporation*, 279 U.S. 438, 449:

> * * * it has long been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. * * * [T]hose [courts] created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold [office] for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

Pursuant to its authority to create legislative courts, with judges lacking "good behaviour" tenure, Congress has in the past established a variety of non-

Article III courts, including the following: territorial courts, established under Article IV, Section 3, clause 2 (see, *e.g.*, *McAllister* v. *United States*, 141 U.S. 174; *The City of Panama*, 101 U.S. 453; *American Insurance Co.* v. *Canter*, *supra*); consular courts and courts exercising jurisdiction over Indian affairs, under Article I, Section 8, clause 3 (see, *e.g.*, *Wallace* v. *Adams*, 204 U.S. 415; *In re Ross*, 140 U.S. 453); courts martial, under Article I, Section 8, clause 14 (*Reid* v. *Covert*, 354 U.S. 1, 41–42 (concurring opinion of Mr. Justice Frankfurter); *Dynes* v. *Hoover*, 20 How. 65); the Court of Customs Appeals and the Court of Claims, under Article I, Section 8, clause 1 (*Williams* v. *United States*, 289 U.S. 553; *Ex parte Bakelite Corporation*, *supra*) [14]; and the United States Tax Court, also under Article I, Section 8, clause 1 (Section 7441 of the Internal Revenue Code, effective December 30, 1969; see *Burns, Stix Friedman & Co., Inc.* v. *Commissioner*, 57 T.C. 392). In addition, since the creation of the District of Columbia, the courts there have included inferior courts, established under Article I, Section 8, clause 17, whose judges have been appointed for terms limited to not more than ten years. See Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 899 (1930).

[14] In *Glidden Co.* v. *Zdanok*, 370 U.S. 530, this Court concluded that in light of supervening legislation, in which Congress declared its purpose to establish the Court of Customs and Patent Appeals (the successor to the Court of Customs Appeals) and the Court of Claims as Article III courts, the judges of those courts now have constitutionally guaranteed "good behaviour" tenure.

2. Legislative Courts May Exercise Jurisdiction Over Inherently Judicial Matters Arising Under the Laws of the United States

Legislative courts, like courts created under Article III, exercise jurisdiction over cases arising under the laws of the United States. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 545 n. 13; *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 641–643 (dissenting opinion of Chief Justice Vinson). Appellant contends (Br. 22–29), however, that since this litigation not only arose under the laws of the United States (see p. 15, *supra*) but also was of a kind requiring judicial, rather than executive or legislative, determination, he was entitled to be heard before an Article III court. But this contention is contrary to the decisions of this Court regarding the jurisdiction of both state courts and congressionally created "legislative courts" with respect to a wide range of inherently judicial matters.

Appellant offers no analysis of what constitutes a case requiring "exercise of the judicial power" (Br. 26). But the indicia of judicial power—the binding adjudication of disputed facts and the issuance of an authoritative judgment—are exhibited by many courts not possessing the attributes of Article III federal courts. We have already seen that state courts, unquestionably exercising "judicial power," have since the foundation of the Constitution entertained and decided cases arising under the laws of the United States.

Similarly, "legislative courts" created by Congress have long exercised jurisdiction over inherently ju-

dicial matters. As appellant concedes (Br. 25–26, n. 28), the legislative courts in federal territories have always been courts of general jurisdiction, capable of trying a wide-ranging assortment of inherently judicial cases, including criminal prosecutions as well as civil actions and suits in admiralty. See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145; *Good* v. *Martin*, 95 U.S. 90; *American Insurance Co.* v. *Canter*, 1 Pet. 511.[18] Courts martial of course possess "the power to try and to punish" (*Relford* v. *United States Disciplinary Commandant*, 401 U.S. 355, 367), and their jurisdiction embraces "not only the power to hear and determine the case, but the power to execute and enforce the sentences of the law" (*Carter* v. *McClaughry*, 183 U.S. 365, 383). Similarly, consular courts exercised jurisdiction over criminal as well as civil matters. *In re Ross*, 140 U.S. 453. As the Court observed in *Williams* v. *United States*, 289 U.S. 553, 567, putting to rest the argument appellant seeks to revive:

> If the power exercised by legislative courts is not *judicial* power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof. [Emphasis in original.]

[18] At present, the district courts of Guam, the Virgin Islands, and the Canal Zone are legislative courts with judges having limited tenure. 48 U.S.C. 1424b and 1614; Title 3 Canal Zone Code § 5. These courts have both original jurisdiction over federal questions and original and appellate jurisdiction over local matters. 48 U.S.C. 1424 and 1612; Title 3 Canal Zone Code § 141. In American Samoa and the Pacific Trust Territory, judicial power is vested in such person or persons as the President may direct. 48 U.S.C. 1661(c) and 1681(a).

As one of the definitive works on the federal courts has pointed out, "[i]t must be concluded * * * that at least in a qualitative sense legislative courts exercise 'judicial power' * * *." See "Note on Legislative Courts" in Hart & Wechsler, *The Federal Courts and the Federal System*, at 348. They give judgments in disputes satisfying the constitutional standards for "cases" or "controversies." In arriving at their judgments, they are free to pass upon the constitutionality of relevant acts of Congress or of executive officials. They can be given the power to punish for contempt. Their judgments are binding for purposes of *res judicata*. And this Court frequently reviews the judgments of such legislative courts in the exercise of its "appellate jurisdiction." See generally *Pope* v. *United States*, 323 U.S. 1, 12–14. Thus there can be no serious challenge to the proposition that non-Article III courts created by Congress can and do constitutionally exercise "judicial power." [16] As we shall now

[16] There may be limits to congressional power to create non-Article III courts. For example, it might be argued that to permit Congress to establish a special court for the determination of issues arising under each legislative power would undercut the general federal question jurisdiction authorized by Article III and subvert the constitutional design of a national judiciary. But such considerations are not present when Congress establishes courts for the administration of justice in an area in which Congress has plenary, not limited, delegated powers. For example, legal matters arising in federal territories typically are of local concern and involve local, not national, law. It was not part of the constitutional design that the national judiciary should concern itself with such matters. See Hamilton, *The Federalist No. 80*. But it is nevertheless necessary that the courts sitting in such areas be courts of general

discuss, Congress has the power to create non-Article III courts to exercise such judicial power over local matters in the District of Columbia, including felony prosecutions.

D. LEGISLATIVE COURTS IN THE DISTRICT OF COLUMBIA MAY TRY LOCAL FELONY PROSECUTIONS

1. Congress may establish legislative courts of local jurisdiction for the District of Columbia

Article I, Section 8, clause 17 of the Constitution grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]." As this Court has often noted, this provision grants Congress "plenary power over the District of Columbia" including "all the legislative powers which a state may exercise over its affairs." See *District of Columbia* v. *Carter*, No. 71–564, decided January 10, 1973, slip op. 11–12; *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100, 108; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435; *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407.

Plenary legislative power over a geographical area naturally embraces the establishment of a court system for the adjudication of local disputes. *Capital Traction Co.* v. *Hof*, 174 U.S. 1. As we have seen (*supra*, pp. 32–37), when Congress establishes courts for the resolution of purely local issues in an area over which it

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subject matter jurisdiction capable of resolving disputes inherently judicial in nature. It was to meet this felt necessity for local courts in areas subject to federal control that this Court first articulated the doctrine of legislative courts. *American Insurance Co.* v. *Canter*, 1 Pet. 511.

has plenary authority, those courts need not comply with the requirements of Article III. Indeed, as appellant acknowledges (Br. 35, n. 42), the courts of purely local jurisdiction established by Congress for the District of Columbia have historically been legislative courts whose judges held only limited tenure. See *supra*, pp. 21–25, 34. This Court has acknowledged the constitutionality of this practice. *Capital Traction Co.* v. *Hof*, *supra*. A majority of the court has further indicated that Congress, in exercise of its plenary power over the District of Columbia, could establish legislative courts in the several states for adjudication of causes between their citizens and the citizens of the District of Columbia. *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 590, 644. Thus the power of Congress to create legislative courts of local jurisdiction for the District of Columbia is too clear to be debated.

Furthermore, there are substantial reasons why the local courts of the District of Columbia *should* have a different constitutional status than do the federal courts. The constitutional provision in Article III, providing for a federal judiciary, evolved from a recognition that a federal forum might be desirable to adjudicate federal questions and to resolve disputes between citizens of different states. See 1 Farrand, *The Records of the Federal Convention*, 124–125, 231, 238 (1911); 2 Farrand, *supra*, 39, 46, 146; 3 Farrand, *supra*, 206–207. The limited jurisdiction allowed to the federal courts by Article III, Section 2 of the Constitution reflects the inherently national nature of the purposes those courts were meant to serve. See Hamilton, *The Fed-*

eralist No. 80 (explaining the "proper extent of the federal judicature"). It was not intended that a local court system established by Congress to meet the day-to-day adjudicative needs of the residents of the District of Columbia would be a part of the judiciary organized under Article III, which Hamilton described as "national tribunals." The function served by the District of Columbia court system is not national but local, and by necessity its jurisdiction extends beyond the categories of cases to which the "judicial power" of the federal judiciary extends under Article III.

Furthermore, at the time of the Constitutional Convention it was apparently generally assumed that the citizens of the district which was to become the seat of the government would themselves have a municipal legislature for all local purposes. See Madison, *The Federalist No. 43*. Presumably it was also anticipated that such a municipal legislature would establish a local judiciary to serve local needs, not governed by the attributes specified by Article III. Cf. *District of Columbia* v. *John R. Thompson Co., Inc., supra*. Moreover, the commentators have generally recognized that the need for flexibility in local administration and the other practicalities of local government in the District of Columbia militate in favor of fixed terms, or limited tenure, for local judges. See Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 902 (1930); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effects on Judicial Assignment*, 62 Colum. L. Rev. 133, 152–153 (1962); Note, *The Legislative Court Problem: A Proposed Solution*, 38 N.Y.U. L. Rev. 302, 316–317 (1963).

For reasons such as these the courts of exclusively local jurisdiction in the District of Columbia have always had judges with limited tenure. The question of judicial tenure was fully discussed during legislative consideration of the Court Reorganization Act, and Congress concluded that the local nature of the District of Columbia courts made retention of the feature of limited judicial tenure appropriate. H. Rep. No. 91-907, 91st Cong., 2d Sess., pp. 38-39.

This Court's decision in *O'Donoghue* v. *United States*, 289 U.S. 516, is not a barrier to the creation of a legislative court system of purely local subject-matter jurisdiction for the District of Columbia. That case involved courts which were "of equal rank and power with those of other inferior courts of the federal system * * *." *O'Donoghue* v. *United States, supra*, 289 U.S. at 534. This Court expressly noted (289 U.S. at 544), quoting from *Federal Trade Commission* v. *Klesner*, 274 U.S. 145, 156, that:

> The parallelism between the Supreme Court of the District [now the United States District Court for the District of Columbia] and the Court of Appeals of the District [now the United States Court of Appeals for the District of Columbia Circuit], on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete.

In concluding that those courts of federal jurisdiction in the District of Columbia were within

Article III, this Court drew support from three principal lines of argument. *First,* the Court distinguished between the transitory nature of the territories, where even the courts of general federal question jurisdiction may be "legislative" in the non-Article III sense, and the permanency of the District of Columbia. *Second,* the Court employed what may now be viewed as a rudimentary equal protection analysis (289 U.S. at 540):

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guarantees, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. We think it is not reasonable to assume that the cession stripped them of these rights * * *.

On the basis of this analysis the Court determined that Congress had the power to establish Article III courts in the District of Columbia. *Third,* the Court proceeded to examine the legislative intent. Noting that the courts in question had been granted the same federal question and diversity jurisdiction as the other inferior federal courts, and that their judges had historically been afforded good behavior tenure, the Court concluded (289 U.S. at 549–550) that "Congress entertained the view that the [Supreme Court and the Court of Appeals] of the District and the in-

ferior courts of the United States sitting elsewhere, stood upon the same constitutional footing." That is, the Court found that Congress had intended to establish these courts under Article III.

The case now before this Court is entirely different from *O'Donoghue*. First, the distinction drawn in *O'Donoghue* between territories and the District of Columbia is no longer wholly apt or relevant. The 1970 Act does not create legislative courts of general federal question jurisdiction for the District of Columbia as Congress has for the territories; its goal was the narrower one of creating separate legislative courts of local jurisdiction. In addition, the remaining territories, Puerto Rico, Guam, the Canal Zone, American Samoa and the Pacific Trust Territory, do not appear to have a merely transitory existence 'necessarily limited to the period of pupilage." 289 U.S. at 537. And although the District of Columbia is a permanent entity within the United States, serious congressional consideration of relinquishing direct legislative authority and substituting "home rule" demonstrates an analogous reason why—just as with "territorial courts"—it was appropriate for Congress to establish a local court system whose judges have a limited tenure.

The second reason in *O'Donoghue* does not apply here at all. The courts below are not courts of general federal jurisdiction having "equal rank and power with those of other inferior courts of the federal system." They are, rather, designedly equivalent in function to state courts; they are courts of essentially local jurisdiction. Consequently, their utilization infringes no principle of equal protection: on the contrary, under

the 1970 Act citizens of the District of Columbia, like citizens of the several states, are provided with a federal forum for the litigation of causes that would be triable in federal court in the states, and with a local forum for the adjudication of essentially non-federal "local" disputes.

Third, the congressional intention to establish legislative courts in this case is clear. In passing the Court Reorganization Act, Congress strongly manifested its intention that these local courts be non-Article III legislative courts, both by expressly so stating (Section 111 of the Act, 84 Stat. 475; D.C. Code § 11–101) and by limiting judicial tenure and providing for removal or suspension without salary by a process other than impeachment (Section 111 of the Act, 84 Stat. 491, 494–495; D.C. Code §§ 11–1502, 11–1526).

Accordingly, nothing said by this Court in *O'Donoghue* limits the power of Congress to establish local legislative courts for the District of Columbia. Indeed, such courts were in existence at the time of that decision and neither this Court, nor, to our knowledge, any other court ever intimated the slightest doubt concerning their constitutionality. Furthermore, as we have indicated above (*supra*, p. 39), subsequent to the decision in *O'Donoghue* a majority of this Court, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc., supra* acknowledged the authority of Congress to establish legislative courts with non-federal jurisdiction on behalf of the citizens of the District of Columbia.

B. There is No Constitutional Ground for Excluding Local Felony Prosecutions From the Jurisdiction of Legislative Courts for the District of Columbia

Appellant's claim that he can only be tried before a judge with good behaviour tenure rests wholly on Article III of the Constitution. He has not suggested that the absence of such a judge in the trial of a felony prosecution denies due process. Nor could he advance such a claim. As the court below noted (A. 57, n. 12) only four states guarantee good behaviour tenure to their judges, and this Court has never suggested that the judicial tenure provided by the other forty-six states falls short of that required by due process. Furthermore, this Court has upheld felony convictions in territorial courts presided over by judges with limited tenure. See, *e.g., Reynolds* v. *United States*, 98 U.S. 145.

For similar reasons, appellant cannot claim that he has been denied equal protection of the laws. In legislating exclusively for the District of Columbia, Congress may in the exercise of its plenary power enact local laws substantively different from national laws. Therefore, it may prescribe procedures for the adjudication of local matters, including prosecutions of exclusively local offenses, different from those applicable to adjudication of matters involving laws national in scope. Congress has limited the criminal jurisdiction of the District of Columbia Superior Court to prosecutions arising "under any law applicable exclusively to the District of Columbia." D.C. Code § 11–923(b). Thus individuals charged with fed-

eral felonies in the District of Columbia are tried in the United States Court, just as they are elsewhere. But appellant belongs to the different class of persons charged only with local, non-federal crimes; the trial of all such persons in non-Article III courts satisfies the requirements of equal protection.

This leaves only appellant's Article III argument, and it is insufficient. We have already contended that nothing in the Constitution prohibits non-Article III courts—whether state courts or congressionally created "legislative courts"—from entertaining cases arising under the laws of United States, including penal and criminal laws. We have also seen that Congress may create legislative courts for the District of Columbia capable of exercising jurisdiction over local matters which are inherently judicial. There is no constitutional ground for excluding local felony prosecutions from that jurisdiction. See *Lurk* v. *United States*, 296 F. 2d 360 (C.A. D.C.), affirmed *sub nom. Glidden Co.* v. *Zdanok*, 370 U.S. 530.

As appellant acknowledges (Br. 33–36), legislative courts established for the District of Columbia have exercised jurisdiction over misdemeanors and petty offenses since 1801. Appellant seemingly rests his entire case on a distinction between misdemeanor prosecutions, which he claims involve only " 'general administrative, police, and legislative powers' " (Br. 35), and felony prosecutions, which require the exercise of "judicial power" (*ibid.*). This argument is based on the mistaken notion that legislative and other non-

Article III courts may not try inherently judicial cases arising under the laws of the United States. See *supra*, pp. 25–30, 35–38.

Furthermore, there is no distinction between misdemeanor and felony prosecutions which is relevant to this issue. Due process considerations require the former as well as the latter to be tried before a judicial tribunal. *In re Oliver*, 333 U.S. 257. Cf. *Groppi v. Wisconsin*, 400 U.S. 505. Indeed, even the assertion of petty offense jurisdiction requires the exercise of an exclusively judicial power. *Ward* v. *Village of Monroeville*, No. 71–496, decided November 14, 1972. Defendants charged with misdemeanors, and even of petty offenses for which imprisonment is a penalty, are ensured the right to counsel. *Argersinger* v. *Hamlin*, 407 U.S. 25. Defendants charged with offenses carrying a penalty of only 90 days' imprisonment are granted the full right of cross-examination. *District of Columbia* v. *Clawans*, 300 U.S. 617. Defendants charged with offenses of a serious character, whether misdemeanors or petty offenses, are entitled to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145; *District of Columbia* v. *Colts*, 282 U.S. 63; *Callan* v. *Wilson*, 127 U.S. 540. Indictments by a grand jury have been required in cases involving serious misdemeanors tried by legislative courts in the District of Columbia. *United States* v. *Moreland*, 258 U.S. 433. Thus this Court has not distinguished between the kind of proceeding required for conviction of a felony and that required in a misdemeanor prosecution.

In short, contrary to appellant's contention, the nature of both proceedings involves the exercise of

true "judicial power." Such judicial power has always been exercised by legislative courts in the District of Columbia.

In enacting the Court Reorganization Act in 1970, Congress merely sought to establish a local court system, comparable to those in the several states, for adjudication of all non-federal matters arising in the District of Columbia. The purpose of this legislation was to reduce significantly the caseload of the basic federal courts in the District of Columbia while still preserving to them their distinctively federal jurisdiction. Furthermore, by creating a dual court system with separate and distinct jurisdictions, Congress eliminated the anomaly, recognized by this Court in *O'Donoghue v. United States, supra,* of Article III courts with extensive non-Article III jurisdiction. See *Hobson v. Hansen,* 265 F. Supp. 902, 925–930 (D.D.C.) (dissenting opinion of Judge Wright). In so doing, Congress naturally gave jurisdiction over the trial of felonies of an exclusively local nature to the local courts. At the same time, in order to preserve necessary flexibility Congress retained the feature of limited judicial tenure which since 1801 has characterized District of Columbia courts of local, non-federal jurisdiction. Nothing in Article III prohibited this sound legislative solution to the vexing problems inherent in the administration of justice in the District of Columbia.

II. THE SELECTIVE STOP OF AN AUTOMOBILE DRIVER FOR THE PURPOSE OF INSPECTING HIS DRIVING PERMIT AND VEHICLE REGISTRATION CERTIFICATE DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE.[17]

Appellant claims (Br. 47–61) that the action of the police officers in initially stopping his automobile was unconstitutional because the officers lacked "'specific and articulable facts which, taken together with rational inferences from those facts, warrant[ed] that intrusion'" (Br. 48, quoting from *Terry* v. *Ohio*, 392 U.S. 1, 21).[18] In common with most states, the District of Columbia makes it unlawful for a motor vehicle to be operated unless the operator has the registration certificate either in his possession or in the vehicle and requires the operator of a vehicle to exhibit his driving permit to any police officer upon demand. D.C. Code (1967 ed.), §§ 40–104(a) and 40–301(c). Contrary to appellant's contention, in enforcing these requirements a police officer may lawfully make a "selective" stop of vehicle operators for the purpose of checking driving permits and registration certificates.

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[17] This Court may decline to consider appellant's Fourth Amendment claim. As appellant acknowledges (Br. 20), that claim is incapable of independently sustaining an appeal even assuming this case to be within this Court's appeal jurisdiction. Thus the Fourth Amendment issue "remains within * * * certiorari jurisdiction, and [this Court] may * * * decline to decide the merits of the issue, much as [it] would dismiss a writ of certiorari as improvidently granted." *Miskkin* v. *New York*, 383 U.S. 502, 512.

[18] Appellant does not challenge the reasonableness of the police action after the initial stop. As the court below observed (A. 65–66):

"* * * the officers had * * * stop[ped] appellant for the sole

It is generally recognized that "permission to operate a motor vehicle upon public highways is a license or privilege." *State* v. *Valstad*, 282 Minn. 301, 311, 165 N.W. 2d 19, 25. See, also, *Commonwealth* v. *Mitchell*, 355 S.W. 2d 686, 688 (Ky. Ct. App.); *City of Miami* v. *Aronovitz*, 114 So. 2d 784, 787 (Fla.). While licensing and registration procedures were originally instituted as revenue measures, they have come to serve public safety functions. "Consequently, it is very much in the public interest that law enforcement officers be permitted to make periodic check-ups on the driving license qualifications of those who operate motor vehicles on the highways." *City of Miami* v. *Aronovitz*, *supra*, 114 So. 2d at 788. So-called "spot checks"—*i.e.*, selective stops of motorists for routine inspection of their driving permits and registration certificates—are an accepted mode for accomplishing such check-ups. *State* v. *Valstad*, *supra*; *State* v. *Rankin*, 477 S.W. 2d 72, 75 (Mo.); *United States* v. *Lepinski*, 460 F. 2d 234, 237 (C.A. 10);

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purpose of asking him for his driving permit and auto rental agreement. Ordinarily, if he had produced these two documents in proper order the police would have been required to permit him to continue driving on his way without any further questioning. However, once he showed them a rental agreement which had apparently expired, they then had sufficient facts from which they might reasonably infer that he was in unauthorized possession of the car he was driving. Therefore, they were entitled to detain him until the rightful ownership and use of that car could be clarified.

"* * * the officers * * * were properly positioned alongside the car at the moment one of them saw the pistol in plain view and seized it. * * *"

United States v. *Ware*, 457 F. 2d 828, 830 (C.A. 7), certiorari denied, October 10, 1972, No. 71-6566; *United States* v. *Turner*, 442 F. 2d 1146, 1148 (C.A. 8); *United States* v. *Cross*, 437 F. 2d 385, 387 (C.A. 5); *Lipton* v. *United States*, 348 F. 2d 591, 593 (C.A. 9).

As the Tenth Circuit recently stated in *United States* v. *Lepinski*, *supra*, 460 F. 2d at 237, "the stopping of the vehicle and the demand [for permit and registration are] lawful and necessary in carrying out * * * statutes regulating motor vehicles." A contrary holding, as was observed by the Ninth Circuit in *Lipton* v. *United States*, *supra*, 348 F. 2d at 593, "would render unenforceable [a] * * * statute requiring that automobile drivers be licensed." [9]

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[9] The cases which appellant cites for the proposition that an "articulable suspicion" is necessary when a moving vehicle is stopped for an inquiry or for a license and registration check (Br. 52, nn. 72 and 73) do not support that proposition. There was, in those cases, a basis for suspicion or cause to stop the vehicles, but the opinions neither stated nor implied that without such suspicion or cause the stops would have been unlawful. To the contrary, *State* v. *Valstad*, *supra*, and *State* v. *Larkin*, *supra*, held that a police officer may stop a vehicle for the purpose of making a routine check, and in *Young* v. *United States*, 435 F. 2d 405, 408 (C.A. D.C.) it was simply stated that, because the police there had an articulable suspicion, "[w]e are not fairly confronted" with the issue of whether they could stop a vehicle in other circumstances. The "articulable suspicion" mentioned in *United States* v. *Fallon*, 457 F. 2d 15, 18 (C.A. 10), cited by appellant, was only that the occupants of the vehicle "were young and the car was a new and very expensive one," thus making them "conspicuous"; the same court held later in *United States* v. *Lepinski*, *supra*, that no grounds for suspicion are necessary. Nor did *City of Miami* v. *Kimovitz*, *supra*, and *Commonwealth* v. *Mitchell*, *supra*, hold, as appellant asserts (Br. 59), that only road blocks, and not spot

Ever since the invention of the automobile, driving on public streets has been considered a necessary subject of government regulation. Lawful operation of a motor vehicle depends on government licensing of the driver and registration of the vehicle. (Often, as in the District of Columbia, a safety inspection of the auto is part of periodic renewal of the registration.) Thus, the principles of *Terry* v. *Ohio*, 392 U.S. 1, are not directly relevant to the right of the police, acting in good faith and not as a pretext for some other purpose, to stop a vehicle for a license and registration inspection. See *United States* v. *Cross*, *supra*, 437 F. 2d at 387, n. 3. In *Terry* a pedestrian had been stopped for questioning. A pedestrian, of course, does not exercise a privilege for which a license is required when he walks abroad, and it is therefore reasonable to require the police to have some specific basis for detaining him against his will, even if only momentarily, for purposes of interrogation.[*] See also *Au Yi Lau* v. *Immi-*

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checks, are available as a means for inspecting licenses. What those two cases held impermissible is stopping a vehicle ostensibly for a license check but actually to provide an occasion for a more extensive search. And while it is true that *Edwards* v. *State*, 318 P. 2d 1021 (Okla.) held that a selective stop must be supported by reasonable cause, this was only because the relevant state statute so provided.

[*] Appellant's reliance upon *Sibron* v. *New York*, 392 U.S. 40, and *Adams* v. *Williams*, 407 U.S. 143, is misplaced. Those cases dealt with the "frisk" aspect of the "stop and frisk" rules enunciated in *Terry*; there is no claim here that the evidence against appellant was discovered by means of a "frisk." While it is true that the respondent in *Adams* was seated in an automobile when approached by a police officer, the officer's purpose was not to inspect his driver's license and vehicle regis-

gration and Naturalization Service, 445 F. 2d 217 (C.A.D.C.), certiorari denied, 404 U.S. 864. But, especially where, as in the District of Columbia, a licensed driver is obliged by statute to exhibit his license and registration on demand, the acceptance and use of a license to drive can properly be found to require the driver to submit to an infrequent, limited, and discretionary interruption of his free movement on the highways. By operation of the legislative licensing system, he has, in a very real sense, no "reasonable expectation of privacy" about the disclosure of his driver's permit and vehicle registration. See, generally, *Katz* v. *United States*, 389 U.S. 347, 361; *Terry* v. *Ohio*, *supra*, 392 U.S. at 9; *Mancusi* v. *DeForte*, 392 U.S. 364, 368; *United States* v. *Dionisio*, No. 71–229, decided January 22, 1973 (slip op. 12–14).

This principle is aptly illustrated by reference to cases dealing with searches of property. A building inspector normally needs a warrant to enter private premises to inspect for violations of the building code. *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541. On the other hand, no warrant is necessary to inspect the premises of a licensed business to ascertain whether there is compliance with the conditions of the license. *United States* v. *Biswell*, 406 U.S. 311. Cf. *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76.

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question but rather to question him about narcotics and a weapon. In *Davis* v. *Mississippi*, 394 U.S. 721, upon which appellant relies, the petitioner was not merely stopped for questioning but was arrested and brought to police headquarters for the purpose of obtaining fingerprints.

Furthermore, in *Terry*, as the Court's opinion acknowledged (392 U.S. at 23), the crux of the case was not the propriety of the police officer's initial confrontation with the citizen "but rather, whether there was justification for [the officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation." The Court's holding that an articulable basis for suspicion is both sufficient and necessary to conduct such a *search* was based on the assessment that even a "limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security * * *" (392 U.S. at 24–25). As the Court explained (392 U.S. at 16–17), "a careful exploration of the outer surfaces of a person's clothing all over his or her body * * * performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised" is not a "petty indignity" but "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."

The conduct now before the Court is poles apart. Spot checks for compliance with traffic licensing laws are so routine that no indignity or affront can be inferred. In addition, the oral request for the driver, motioned to the side of the road in an automobile, to display his license and registration bears none of the intrusive characteristics of a forcible physical search of the person. The Court made clear in *Terry* (392

U.S. at 20-21) that application of the "reasonableness" standard of the Fourth Amendment involves balancing the need to search against the invasion of privacy the search entails. Here we are not concerned with a search at all but with what constitutes at most a momentary detention. In light of the long settled and unique need to assure compliance with traffic laws by spot checking, and in light of the minimal interference with personal privacy that is occasioned, the "reasonableness" balance should be struck in favor of the constitutionality of this practice.

Although conceding the utility of the practice, appellant suggests that registration and permit inspections should be limited to "non-discriminatory and non-selective road blocks" (Br. 59). These would be effective, he suggests, because "[s]uch periodic, non-discriminatory inspections would doubtless become publicized in a given locality, thus acting as a further deterrent against unlicensed motorists taking to the public streets" (Br. 60, n. 85). While we fail to see why such a wholesale dislocation of the traffic flow is constitutionally preferable to selective "spot checks," the relative effectiveness of various enforcement techniques is a matter best left to the discretion of local officials, who may well conclude that random checks are more effective in keeping unlicensed motorists off the streets. The distinction was recognized in *United States* v. *Biswell, supra,* where this Court explained (406 U.S. at 316) that, when the conditions which inspections are intended to disclose are "relatively

difficult to conceal or to correct in a short time, * * * [p]eriodic inspection suffice[s], and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system * * *." But, the Court continued (*ibid.*), if the inspection authorized by the statute there at issue "is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."

The same realistic approach should govern driver's license and vehicle registration inspections; a major deterrent against driving without possessing valid papers is the concern that an unannounced spot check might disclose the delinquency.[11] And, as with the compliance inspections in *Biswell*, temporary unannounced stops to check licenses and registrations pose at most only limited threats to the motorist's justifiable expectations of privacy, since, if he chooses to drive, he does so with the knowledge that he might be required at any time to establish that he is doing so in conformity with controlling statutes and regulations.

CONCLUSION

For the foregoing reasons, the Court should treat the case as before the Court on petition for a writ of certiorari. To the extent the merits of the case are

[11] In the present case, the stop of appellant was not entirely random, because the officers knew that the auto he was driving was a rental car and there had been prior experiences with unauthorized operation of such vehicles.

reached, the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
PHILIP A. LACOVARA,
Deputy Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.
ROGER A. PAULEY,
MARSHALL TAMOR GOLDING,
Attorneys.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR APPELLANT

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attorney for Appellant

Washington, D.C. • THIEL PRESS • (202) 393-0625

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REPLY BRIEF FOR APPELLANT

I.

Glossing over the Congressional purpose underlying the "national"-"local" division of jurisdiction among the reorganized courts sitting in the District of Columbia

(Br.[1] at 16-17), the Government argues for a "plain language" construction of 28 U.S.C. §1257. The strained and quite unreasonable result of the Government's reading of the statute[2] is ample reason for this Court not to depart from the construction which it placed on a similar enactment fifty years ago in *Balzac v. Porto Rico*, 258 U.S. 298.[3] *Balzac* is not properly distinguished by the fact that the local legislature, as opposed to the Congress, enacted the statute there in issue. *District of*

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[1]The abbreviation "Br." refers to the Brief for Appellant; "Gov't Br." refers to the Brief for the United States.

[2]The Government suggests that Congress, by making Section 1257(2) applicable to appeals from the District of Columbia Court of Appeals, intended to exclude cases such as this one involving a constitutional attack on a local statute but to include that rare case such as *Young v. Masci*, 289 U.S. 253, where, by application of its conflict of laws principles, the Court of Appeals has passed upon the constitutional validity of a statute of a state in the course of a civil proceeding. The Government suggests no reason why Congress would have intended such an odd result, and we can think of none. More importantly, if the situation presented in *Young* arose again, we would think it appropriate to reconsider the *sub silentio* conclusion reached in that case and entertain appeals involving constitutional challenges to state statutes pursuant to Section 1257(2) only where there has been an *authoritative* resolution of the statute's validity by the highest court of the state whose statute is subject to challenge. Such a requirement would not only permit of authoritative state law construction of the statute, thereby avoiding needless constitutional adjudication, but would also comport with the policy reflected in the laws of many states requiring the state's attorney general to be notified of, and permitted an opportunity to intervene in, a case involving constitutional challenge to one of that state's laws. Compare *Young v. Masci, supra* with N.Y. C.P.L.R. §1012(b).

[3]The issue in *Balzac* was not whether "an enactment by the territorial legislature was a 'statute of [a] state' for purposes of the federal review statute" (Gov't Br. at 21 n. 7), for that issue had

Columbia v. Thompson Co., 346 U.S. 100.[4] Under the principle of statutory construction adopted in *Balzac*, this case is properly here on appeal.

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already been foreclosed by *Miners' Bank v. Iowa*, 12 How. 1. Instead, the issue in *Balzac*—and the issue presented here—was the "manifest purpose" of Congress reflected in a statute providing that review of final decisions of a court exercising "local" jurisdiction would thereafter be available in this Court as if the case were brought here from the highest court of a state. *Balzac v. Porto Rico, supra*, 258 U.S. at 302. Resolution of that issue most assuredly did not require a holding that Puerto Rico was thereafter to be considered a "state" for all jurisdictional purposes. Compare *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n. 1 with *District of Columbia v. Carter*, No. 71-564, decided January 10, 1973, slip op. at 2-3. Similarly, our argument based upon statutory construction and Congressional intent reflected in 28 U.S.C. §1257 on this branch of the case has nothing whatever to do with the constitutional definition of a "law of the United States" within the meaning of Article III. Compare *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-531.

[4]The Government's effort to distinguish *Balzac* on such grounds overlooks the fact that a "statute of [a] state" within the meaning of Section 1257(2) includes not only formal enactments of the legislature, but a host of other official promulgations which have the effect of law. *E.g., Poulos v. New Hampshire*, 345 U.S. 395, 402 (municipal ordinance); *Live Oak Association v. Railroad Commission*, 269 U.S. 354 (commission regulation). See generally, *Lathrop v. Donohue*, 367 U.S. 820, 825. Under the Government's construction of *Balzac*, statutes applicable exclusively to the District of Columbia which were enacted by the Congress would not be subject to appeal under Section 1257(2), whereas such statutes enacted by one of the local legislatures that have sat in the past in the District of Columbia, together with other official acts of local officials, would be subject to appeal. Nothing in the legislative history is cited in support of this odd construction, and no principle of statutory construction of which we are aware will support such a confusing distinction.

II.

Seemingly conceding that Article III's good behavior tenure and associated constitutional restrictions against impingement of the independence of the federal judiciary are "essential safeguard[s]"[5] and "basic constitutional protections designed in part for the protection of litigants,"[6] the Government no longer presses its earlier contention that appellant lacks standing to challenge the non-Article III status of the court that heard his case.[7] Instead, the Government now argues that Congress may deprive litigants of these basic constitutional protections and safeguards by the simple expedient of creating a federal "legislative court" to decide their cases. Putting aside its refutation of arguments we do not make,[8] the Government's position reduces to three propositions: (1) Article III imposes no restriction on the class of case which Congress may commit to non-Article III federal tribunals for adjudication (Gov't Br. at 26-38); (2) the plenary legislative power of Congress with respect to the District of Columbia permits it to vest jurisdiction over all "local" matters including "local" felonies in non-Article III courts (Gov't Br. at 38-48); and (3) the

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[5] *O'Donoghue v. United States*, 289 U.S. 516, 533 ("essential safeguard"), 540 ("right" and "guaranty"). Hamilton, *The Federalist* No. 78.

[6] *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (opinion of Harlan, J.); *Evans v. Gore*, 253 U.S. 245, 253.

[7] Motion to Dismiss or Affirm at 6 n.4.

[8] We do not contend that "Congress must confer all of the potential jurisdiction to which the 'judicial Power of the United States extends' on national courts created under Article III" nor do we argue "that any court entertaining or adjudicating a case arising under the laws of the United States must be exercising the judicial power of the United States" (Gov't Br. at 26).

"implications" of our contrary position have not been "discussed" (Gov't Br. at 27). We reply *seriatim*.

1. The Government's Article III Argument

Relying on the supposed power of Congress to require state courts to hear and determine federal criminal cases (Gov't Br. at 25-30) and the federal "legislative courts" (Gov't Br. at 30-38), the Government argues that there is no class of case which, if tried by a federal tribunal, must be heard and determined by a constitutional court. Analysis of the reasons advanced in support of this extraordinary proposition demonstrate that they do not support the Government's thesis.

a. *The State Court Argument.* Even on the *arguendo* assumption that Congress, by virtue of the Supremacy Clause of the Constitution (Art. VI, §2), could require state courts to hear and determine all criminal cases arising under the laws of the United States,[9] it does not

[9] Although it is true that early Congresses purported to confer jurisdiction upon state courts to enforce federal criminal laws, state courts balked at doing so. Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes*, 60 Harv. L. Rev. 966, 967-968 (1947). As early as 1816, Mr. Justice Story, writing for the Court, declared: "No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 337. (The quoted portion of the Court's opinion is probably dictum, although this Court later referred to it as an "express holding." *Houston v. Moore*, 5 Wheat. 1, 69). In 1846, relying on the international law notion that one sovereign does not enforce the penal laws of another, this Court held that Congress could not compel a state court to hear a federal criminal case. *Prigg v. Pennsylvania*, 16 Pet. 539, 615. See also, *Fox v. Ohio*, 5 How. 410, 438. While *Testa v. Katt*, 330 U.S. 386, did indeed abandon the penal law concept which undergirds *Prigg*, that case did not involve

at all follow that Congress is thereby free of the command of Article III when it provides that such cases shall be heard in federal tribunals. When a state court hears a case arising under federal law, the court is exercising the judicial power of the state, not that of the United States. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220-223; *Mondou v. New York, N.H. & H.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55-57; *Williams v. United States*, 289 U.S. 553, 566 n.1; *Ward v. Jenkins*, 10 Metc. (Mass.) 583, 589 (1846).[10] By its terms, Article III is a limitation on the exercise of federal, not state, judicial power, and it is thus wholly irrelevant that today most states do not provide life tenure for their judges.[11]

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the question whether Congress could compel state courts to adjudicate federal criminal cases nor, of course, did *Prigg* or *Testa* pursue the difficult constitutional questions which would arise if Congress ever attempted to do so. See *infra*, pp. 7-8.

[10] The commentators have recognized this fundamental principle. Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 596-597 (1925); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes*, 60 Harv. L. Rev. 966, 973 n.62 (1947). See also, Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 463 n.102 (1959).

[11] At the time the federal constitution was adopted, most state court judges held their office during good behavior. See Haynes, *Selection and Tenure of Judges* 80-135 (1944); Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 456-458 (1959); Nelson, *Variations on a Theme–Selection and Tenure of Judges*, 36 So. Cal. L. Rev. 4, 14 (1962); Elliott, *Judicial Selection and Tenure*, 3 Wayne L. Rev. 175 (1957). Justice Traynor has developed the history which prompted many states, beginning in about 1830, to amend their constitutions and revise the good behavior tenure of their judges, and he observed that "[o]nly the difficulty of amending the Constitution saved the federal judi-

Moreover, the logical extension of the Government's state court argument demonstrates its fallacy. When tried in a federal court, including a federal court sitting in the District of Columbia to hear a "local" criminal case, a defendant is entitled to insist that the proceeding be commenced by a grand jury indictment in accordance with the Fifth Amendment. *United States v. Moreland*, 258 U.S. 433. This Court has held that a defendant appearing before a state court enjoys no such right. *Hurtado v. California*, 110 U.S. 516. When tried in a federal court, including a federal court sitting in the District of Columbia to hear a "local" criminal case, the defendant is entitled to insist upon trial by jury in accordance with the command both of Article III, §2 and the Sixth Amendment. *District of Columbia v. Colts*, 282 U.S. 63, 74; *District of Columbia v. Clawans*, 300 U.S. 617; *Callan v. Wilson*, 127 U.S. 540. This Court has held that a defendant in a state court enjoys no such Article III and Sixth Amendment right to jury trial. *Johnson v. Louisiana*, 406 U.S. 356; *Apodaca v. Oregon*, 406 U.S. 404; *Duncan v. Louisiana*, 391 U.S. 145; *Williams v. Florida*, 399 U.S. 78. Surely, the Government would not seriously maintain that a defendant before a federal court, even one sitting in the District of Columbia to hear a "local" criminal case, could be stripped of his right to grand jury indictment and trial by jury in accordance with Article III and the Sixth Amendment simply because a state court might not have to afford those important rights to litigants before it.[12] The

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ciary" from similar tenure amendments. Traynor, *Who Can Best Judge The Judges*, 53 Va. L. Rev. 1266, 1276 (1967).

[12] The Government has assumed that were Congress to vest federal criminal jurisdiction in state courts, none of the constitutional protections afforded litigants in federal courts would apply.

Government has advanced no reason, and we perceive none, to place the important safeguards afforded litigants by Article III judges on any different footing.[13]

b. *The Judicial Power Argument.* The Government contends that there is no class of case which Congress may not constitutionally commit to a federal "legislative court" sitting either in the states or the District of Columbia for final disposition (Gov't Br. at 35-38). It supports this extraordinary proposition by contending that "legislative courts" exercise "judicial power" and it places principal reliance on this Court's opinion in *Williams v. United States*, 289 U.S. 553 (Gov't Br. at 36), and on Professors Hart and Wechsler's treatise (Gov't Br. at 37).[14]

That is a dubious proposition in view of cases such as *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 524; *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363; and *Ellis v. Union P.R. Co.*, 329 U.S. 649, 653. See generally, *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360. It will be time enough to deal with those difficult constitutional questions which would arise under the Government's theory if Congress ever passes the hypothetical legislation upon which its argument rests. At such a time, with respect to the issue advanced in this case, it might be relevant that state court judges are not subject to salary reduction, discipline, non-reappointment, or removal by either the federal executive or the federal legislature.

[13] It serves to highlight the inapplicability of the Government's state court argument to recall that the District of Columbia is the one place in the permanent federal union where Congress could not call upon state judicial power to enforce federal criminal law.

[14] The Government's reliance on *In re Ross*, 140 U.S. 453 (Gov't Br. at 34, 36), is difficult to understand in view of *Reid v. Covert*, 354 U.S. 1, 10-12 (opinion of Black, J.), 50, 56-64 (Frankfurter, J., concurring), 74-78 (Harlan, J., concurring). Reliance on the territorial court cases (Gov't Br. at 34-36) is foreclosed. *District of Columbia v. Carter*, No. 71-564, decided

To return the argument to proper focus, we reproduce in full the quotation which the Government has selectively excerpted in its brief (Gov't Br. at 37):

> "It must be concluded, must it not, that at least in a qualitative sense legislative courts exercise 'judicial power'? As Justice Sutherland said in Williams (289 U.S. at 567), 'If the power exercised by legislative courts is not judicial power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof.' But he added (p. 565) that 'the question still remains—and it is the vital question—whether it is the judicial power defined by Art. III of the Constitution'." Hart & Wechsler, *The Federal Courts and the Federal System* 348 (1947).

Elsewhere, the authors focused on the very issue presented by this case:

> "Q. Does the Constitution give people any right to proceed or be proceeded against, in the first instance, in an inferior federal constitutional court rather than a federal legislative court?
>
> "A. *As to criminal defendants charged with offenses committed in one of the states, surely.* As to others, it's hard to say. The answer may well vary for civil plaintiffs and civil defendants. And it must vary, must it not, according to the nature of the right in question and the availability and scope of review in a constitutional court?" Hart & Wechsler, *supra*, at 313 (emphasis added).

January 10, 1973, slip op. at 13 n.28; *Glidden Co. v. Zdanok*, 370 U.S. 530, 544-548 (opinion of Harlan, J.); *Reid v. Covert*, 354 U.S. 1, 50-54 (Frankfurter, J., concurring), 74-76 (Harlan, J., concurring); *O'Donoghue v. United States*, 289 U.S. 516.

The issue presed by appellant is not properly resolved by affixing a label to the power exercised by "legislative courts"—whether that label be "judicial power" in the generic, but not constitutional, sense,[15] or some other governmental power[16]—but instead by an examination of the nature of the matter committed to the legislative tribunal for adjudication. *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-550 (opinion of Harlan, J.), 600-601 (Douglas, J., dissenting); *Crowell v. Benson*, 285 U.S. 22, 50; *Williams v. United States*, 289 U.S. 553, 569, 579-580; *Ex parte Bakelite Corp.*, 279 U.S. 438, 453; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 280, 284.

Most frequently, this Court has expressed the issue by distinguishing between matters which "require" exercise of Article III's judicial power and those which merely permit of, but do not require, exercise of that power.[17] Other views have also been advanced. For example, Mr. Justice Brandeis has suggested that "due process" considerations determine the limit of the legislature's power

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[15] *E.g.*, *Williams v. United States*, 289 U.S. 553, 566.

[16] *E.g.*, *Ex parte Bakelite Corp.*, 279 U.S. 438, 449, 451, 453.

[17] *E.g.*, *Williams v. United States*, 289 U.S. 553, 579-580; *Ex parte Bakelite Corp.*, 279 U.S. 438, 453. As Professor, later Mr. Justice, Frankfurter has painstakenly demonstrated, the term "judicial power" requires resort to history in order to impart meaning to the constitutional phrase. Frankfurter and Landis, "*Power of Congress Over Procedure in Criminal Contempts in 'Inferior Federal Courts'—A Study in Separation of Powers*," 37 Harv. L. Rev. 1010, 1016-1023 (1924). In this regard, it is highly significant that the Judiciary Act of 1789, as well as the Organic Act of 1801, established constitutional courts to hear and determine serious criminal matters prosecuted by the federal authorities before federal tribunals. See Br. at 33-36.

to provide for adjudication of certain classes of cases in federal tribunals other than the constitutional courts.[18] More recently, Mr. Justice Douglas has said: "it does not advance analysis by calling the function a 'judicial' one * * *, for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problem is the manner in which that judicial power is to be exercised."[19] But, whatever the focus of the analysis, the result in this case is the same: a serious criminal case cannot be committed to a federal tribunal other than a constitutional court. *E.g., Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 475, 485-488; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 76-77 (Brandeis, J., dissenting); *Glidden Co. v. Zdanok*, 370 U.S. 530, 601 (Douglas, J., dissenting). Accord: *O'Callahan v. Parker*, 395 U.S. 258, 264; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18; *Callan v. Wilson*, 127 U.S. 540, 556-557. Concededly, no case in this Court's jurisprudence squarely so holds but that, we submit, is simply because Congress has never before

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[18] *Crowell v. Benson*, 285 U.S. 22, 86-87 (dissenting opinion); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (concurring opinion). As Justices Stone and Cardozo pointed out, the due process view of Mr. Justice Brandeis runs counter to the "weight of precedent that has now accumulated against it." 298 U.S. at 93 (concurring opinion). We understand Justice Brandeis' "due process" test to be merely a gauge by which those matters which must be adjudicated in a constitutional court may be identified. Given a matter such as the felony involved in this case, we read Justice Brandeis' concurrence in the Court's opinion in *O'Donoghue v. United States*, 289 U.S. 516, as assent to the view that Article III's safeguards are infringed when such a matter is committed to a non-constitutional "court" for adjudication.

[19] *Glidden Co. v. Zdanok*, 370 U.S. 530, 598 (dissenting opinion).

attempted to deprive a federal felony defendant of Article III's safeguards and protections.

Just as contemporary constitutional history has fleshed out the meaning of Article III's command that "trial of all crimes, except in cases of impeachment, shall be by jury,"[20] so too there is substantial historical support for the exclusion of minor criminal matters from the mandatory reach of Article III's judicial power. Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443 (1959). See generally, *District of Columbia v. Clawans*, 300 U.S. 617, 624-628; *In re Kaine*, 14 How. 103, 119; cf. *Capital Traction Co. v. Hof*, 174 U.S. 1, 17. Both in the District of Columbia and in the several states, Congress has utilized non-Article III federal officers for the determination of minor criminal offenses and has authorized those officers to impose punishments not exceeding one year incarceration.[21] Whether by doing so, Congress has gone too far is not the issue presented by this case for, whatever the constitutional dividing line,[22]

[20] Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). See *Callan v. Wilson*, 127 U.S. 540; cf. *Cheff v. Schnackenberg*, 384 U.S. 373.

[21] 18 U.S.C. §3401 now authorizes federal magistrates to try "minor" criminal cases and impose punishments not exceeding one year in prison. Under this statute, the power is exercised concurrently with Article III judges. In the District of Columbia, the justices of the peace have historically had a similar power. See Br. at 35. *But cf. United States v. More*, 3 Cranch 159 (C.C.D.C.) (Marshall, C.J. and Cranch, J.), *error dismissed*, 3 Cranch 159 (1805). See *infra*, p. 18 n.32.

[22] There is a suggestion in *Callan v. Wilson*, 127 U.S. 540, 556, that the separate class of "petty" criminal case to which we refer does not extend to "infamous crimes." See *United States v.*

it is clear that there is a separate class of minor criminal offenses which historically have been treated as distinct from the serious felony. For the Court to hold, as we urge it to do, that a felony prosecution cannot be heard and determined by any federal tribunal other than a constitutional court is surely not to hold that all criminal cases, no matter how minor, to which the judicial power of the United States might extend must be so tried. *A fortiori*, the holding which we seek has no bearing at all on the relationship of Article III to civil actions tried before federal tribunals.[23]

Moreland, 258 U.S. 433. Reviewing the historical materials in the context of Article III's jury trial proviso, this Court has fixed incarceration not exceeding six months as the constitutional limit for punishment by a judge sitting without a jury. *Cheff v. Schnackenberg*, 384 U.S. 373. Other cases suggest that the nature of the offense is of critical constitutional significance. *District of Columbia v. Clawans*, 300 U.S. 617; *Cheff v. Schnackenberg*, 384 U.S. 373, 389 (Douglas, J., dissenting).

[23] See generally, Hart & Wechsler, *The Federal Courts and the Federal System* 313-340 (1953). In dealing with civil actions, this Court has uniformly followed the principle set forth in cases such as *Williams v. United States*, 289 U.S. 553, and *Crowell v. Benson*, 285 U.S. 22, and distinguished between matters which necessarily require exercise of Article III's judicial power, and those which permit of decision in other ways. As to civil actions against the United States (and *a fortiori*, the District of Columbia), see *Glidden Co. v. Zdanok*, 370 U.S. 530; *Williams v. United States*, 289 U.S. 553. As to particular matters committed by Congress to non-Article III tribunals, see *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; *Crowell v. Benson*, 285 U.S. 22; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49. In such cases, the eventual right of judicial review by a constitutional court, and the scope of such review, may be relevant. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. Pa. L. Rev. 163 (1949). Compare *United States v. Kras*, ___ U.S. ___, 41 L.W. 4117, 4122 with *id.* at 4126 n. 5

2. The Government's District of Columbia Argument

The Government does not argue that Article III is inapplicable in the District of Columbia, seemingly agreeing that that issue is foreclosed by *O'Donoghue v. United States*, 289 U.S. 516. See also, *District of Columbia v. Carter*, No. 71-564, slip op. at 13 n.28. Instead, the Government now argues that there is a constitutional distinction between "local" and "national" matters, and that if a matter is "local," the felony defendant may be deprived of the constitutional safeguards afforded litigants by Article III's guaranties of judicial independence (Gov't Br. at 38-48). We contend that the "national"-"local" distinction should not control decision in this case for three separate reasons: (1) this Court has never before recognized the "local" nature of an offense or cause of action as a reason to deprive litigants of important constitutional safeguards, and those who wrote Article III did not contemplate any such distinction; (2) the District of Columbia is "national" not "local"; and (3) the distinction for which the Government contends, if accepted, will be the breeding ground of much constitutional litigation both in the District of Columbia and elsewhere.

(Marshall, J., dissenting). As to civil actions involving "suits at common law," see *Capital Traction Co. v. Hof*, 174 U.S. 1. Contrary to the Government's reading of the case (Gov't Br. at 38-39), *Capital Traction* holds that the Seventh Amendment is violated when such a civil action is tried before a non-Article III officer, sitting with a "jury," unless there is a right to trial *de novo* before a constitutional court sitting with a constitutional jury. 174 U.S. at 17-18, 45-46. (Another facet of the *Capital Traction* holding involving the Seventh Amendment's requirement of a twelve-member jury is presently pending *sub judice* before the Court. *Colgrove v. Batten*, No. 71-1442, argued January 17, 1973).

First, this Court has never accepted the "local" nature of a particular criminal offense or civil action as a reason for depriving a litigant before the federal courts sitting in the District of Columbia of any of the constitutional rights and safeguards pertaining to the manner in which the federal judicial power is to be invoked and exercised. The leading cases dealing with the applicability in the District of Columbia of Article III's right to trial by jury,[24] the Fifth Amendment's guarantee of a grand jury indictment,[25] the Sixth Amendment's right to trial by jury,[26] and the Seventh Amendment's similar right in a civil action[27] were all "local" cases. The only constitutional right yet to be held applicable to the District of Columbia is the safeguard afforded litigants by Article III's guarantee of judicial independence.[28] It is abundantly clear that those who wrote Article III contem-

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[24] *District of Columbia v. Colts*, 282 U.S. 63, 74; *District of Columbia v. Clawans*, 300 U.S. 617, 624; *Callan v. Wilson*, 127 U.S. 540, 547.

[25] *United States v. Moreland*, 258 U.S. 433.

[26] *District of Columbia v. Clawans*, 300 U.S. 617; *Callan v. Wilson*, 127 U.S. 540.

[27] *Capital Traction Co. v. Hof*, 174 U.S. 1.

[28] In *O'Donoghue v. United States*, 289 U.S. 516, 540, this Court emphatically rejected the notion that persons whose cases are heard and determined by the federal courts sitting in the District of Columbia were to be deprived of "the guaranty of an independent judiciary * * *." In *Lurk v. United States*, the companion case to *Glidden Co. v. Zdanok*, 370 U.S. 530, this Court issued a writ of certiorari to consider whether a defendant charged with a "local" offense was deprived of this guaranty when tried before a judge, sitting by designation, then thought not to enjoy Article III independence. Decision of the issue presented here was rendered unnecessary in view of the Court's conclusion that Lurk had been tried by an Article III judge.

plated that it would protect litigants without regard to the "local" nature of the matter before the federal court:

> "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those of ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. * * *
>
> *But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.* Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them * * *." Hamilton, *The Federalist No. 79* at 487-488 (Lodge ed. 1888) (Emphasis added.)

Second, the District of Columbia is not "local" but "national." *O'Donoghue v. United States*, 289 U.S. 516, 539; *Callan v. Wilson*, 127 U.S. 540, 550. In constitutional theory, citizens of the several states have the right to travel to the District of Columbia to seek redress from the several branches of the national government. *Crandall v. Nevada*, 6 Wall. 35, 43. In contemporary times, the nation's capital is visited daily by tens of thousands of

people who do not reside here: tourists from every state, businessmen meeting with important government officials, foreign visitors and diplomats, lawyers and litigants with matters pending before this Court or one of the other important federal courts and administrative agencies which sit in the District of Columbia, and those who live in nearby states and travel to the federal city for work, study or recreation. Indeed, appellant, who resided in Maryland,[29] was exercising his right to come to the District of Columbia when he was arrested and charged with a felony. We fail to perceive how appellant, or any of the other people who daily come to the District of Columbia, in the exercise of one constitutional right can be found to forfeit another. We find it equally difficult to understand why appellant could have demanded the safeguards afforded by Section 2 of Article III[30] but not those afforded by Section 1 of Article III.

To say that the District of Columbia is "national" in one sense, is not to deny the plenary legislative power of Congress over a host of "local" matters pursuant to the grant of plenary legislative power contained in Article I, §8, cl. 17. *District of Columbia v. Thompson Co.*, 346 U.S. 100. Nor, of course, does our argument have any bearing on "home rule" proposals (Gov't Br. at 43).[31] We

[29] Supplemental Transcript at p. 4. (The supplemental transcript is in the record on appeal, but is not reproduced in the printed appendix.)

[30] *District of Columbia v. Colts*, 282 U.S. 63, 74.

[31] The District of Columbia has had various forms of "home rule" government before. *District of Columbia v. Thompson Co.*, 346 U.S. 100. If Congress wishes to do so, there is nothing in the Constitution which would prevent Congress from authorizing the appointment of federal judges in the District of Columbia "in the President alone, in the courts of law, or in the heads of departments." Article II, §2, cl. 2. But just as a local legislature

merely emphasize what this Court has repeatedly held: that the plenary "local" legislative power which Congress enjoys with respect to the District of Columbia is subject, like every other legislative power, to the commands and prohibitions of the Constitution. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *O'Donoghue v. United States*, 289 U.S. 516, 545.[32]

Third, the "local" distinction for which the Government contends is one which is not applicable only to the District of Columbia, but it is a distinction which, if adopted, will lead to much difficult constitutional litigation. Federal criminal statutes run the gamut insofar as their constitutional bases are concerned. Some federal crimes turn on the federal status of the actor,[33] others on the federal status of the victim.[34] Some federal crimes

could not deprive litigants of trial by jury, or grand jury indictment, we submit that such delegated legislative power would not permit a "home rule" legislature to deprive litigants of their constitutional safeguard of judicial independence.

[32] The status of the District of Columbia as a municipal corporation may have additional bearing on the relationship of Article III with respect to minor criminal matters. Doub and Kestenbaum, *Federal Magistrates for The Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 458 n.74, 464 n.104 (1959). See *Capital Traction Co. v. Hof*, 174 U.S. 1, 17.

[33] *E.g.*, 18 U.S.C. §201, the federal bribery statute which includes "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia."

[34] *E.g.*, 18 U.S.C. §1114, the federal statute which provides punishment for the murder of important federal officials including "a judge of the United States, any United States Attorney * * * [or] any employee of the Department of Agriculture designated * * * to carry out any law or regulation, or to perform any function in connection with * * * any program of * * * the District of Columbia * * *."

turn on the federal situs of the prohibited conduct,[35] others on the use of commerce to effectuate the prohibited conduct.[36] With respect to the District of Columbia, some crimes based on the legislative power contained in Article I, §8, cl. 17 are found in the District of Columbia Code,[37] while others are in the United States Code.[38] Mere separation of the "local" from the "national" is a difficult enough problem.

Frequently, the same conduct gives rise to a variety of potential criminal charges. The problems which accompany prosecutorial discretion to select from among several criminal statutes the one under which defendant will be prosecuted is a difficult enough problem[39] without adding to the consequences of the prosecutor's choice a deprivation of the constitutional safeguard of judicial independence. Several examples will suffice to make the point. One who murders an important federal official has violated a federal statute of nationwide applicability, 18 U.S.C. §§1114, 1751, and if charged under that statute would be entitled to an Article III court sitting in the District of Columbia. 11 D.C. Code §502; 18 U.S.C. §3231. Under the Government's proposed "local" test, however, that same defendant can be deprived of the safeguards of Article III's guaranty of judicial independence by the mere selection of a different statute, 22 D.C. Code §2401, on which to base the

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[35] *E.g.*, 18 U.S.C. §§7, 13.

[36] *E.g.*, 18 U.S.C. §§1074, 1952.

[37] See generally, Title 22, District of Columbia Code.

[38] See, *e.g.*, 15 U.S.C. §3. *United States v. National Association of Real Estate Boards*, 339 U.S. 485.

[39] See, *e.g.*, *Berra v. United States*, 351 U.S. 131; *Newman v. United States*, 127 U.S. App. D.C. 263, 382 F.2d 479 (1967).

prosecution. On the day-to-day level, the same is true of those many prosecutions involving narcotic drugs.[40] Indeed, in this very case appellant would have enjoyed Article III safeguards had the Government instituted its prosecution under 18 U.S.C. App. §1202(a).[41]

While we have not grounded our claim in this case on due process-equal protection grounds, future defendants will surely do so if the Government's "national"-"local" distinction be adopted. We think that the appropriate constitutional inquiry is the serious nature of any federal felony prosecution, and the substantial consequences which those convicted of such crimes face, and not the source of the legislative power which Congress exercised in proscribing the particular conduct in issue.

3. The Government's "Implications" Suggestion

The Government suggests that we have failed to discuss the "implications" of our contention that a felony prosecution, if tried in a federal court, must be before an Article III judge (Gov't Br. at 27). In our opening brief, we had assumed that such "implications" would await a

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[40] Compare 26 U.S.C. §§4704(a), 4723 with 33 D.C. Code §402.

[41] Appellant has previously been convicted of a felony (A. 3). On the evening of his arrest, appellant, a Maryland resident, was arrested while driving a rented automobile with Virginia license plates in the District of Columbia (A. 12-13; see *supra*, p. 17 n.29). Other testimony established that appellant was coming to the District of Columbia for a dinner engagement with friends (Supplemental Transcript, pp. 35-36) when he was selected for a "spot check" during which the police officers testified they discovered a gun (A. 12-18). See *United States v. Bass*, 404 U.S. 336, 350-351.

future case (Br. at 46 n.64). In view of the Government's point, however, it is appropriate to respond briefly even though we submit that "implications" are irrelevant to the disposition of the issue before the Court.[42]

If the Court should hold, as we ask it to do, that appellant was entitled to have his case heard and determined by an Article III court, it must be assumed that others would seek to apply that holding retroactively either to overturn otherwise final judgments, or to raise on appeal an issue that was not raised in the trial court. It must also be assumed that defendants awaiting trial on felony indictments pending in the Superior Court would demand Article III courts for the disposition of their cases. The "implications" of the holding we seek, either retroactively or prospectively, are not overly grave.

Those who seek to retroactively apply such a ruling would face a steep obstacle to success in view of the fact that the Court Reform Act contains an express provision permitting the designation of Article III judges to preside over trials in the Superior Court. 11 D.C. Code §908(c). In the face of such a strong reason for requiring a pre-trial objection, it may well be that this Court's holdings in

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[42] The Government has successfully argued that only those convicted by a non-Article III court have standing to raise the issue presently posed. *Bradford v. Greene*, 142 U.S. App. D.C. 237, 440 F.2d 265 (1971). In view of the requirement of a final judgment as a prerequisite for review in this Court, 28 U.S.C. §1257, this case could not have been brought here sooner. With the exception of a few additional days to prepare pre-trial motions in the Superior Court (A. 1), appellant has not sought a single extension of procedural time limits for the presentation of briefs. If, as the Government seems to suggest, "implications" have any bearing on this case, no litigant can ever gain appropriate review and redress for a claimed deprivation of Article III safeguards.

cases such as *McDowell v. United States*, 159 U.S. 596, 601-602 and *Ball v. United States*, 140 U.S. 118, would end the matter.[43] Even if, as this Court held in *Glidden Co. v. Zdanok*, 370 U.S. 530, 536, the right at issue here is so "basic" as to warrant correction on direct appeal without the usual requirement of a trial court objection, the number of persons affected is not great. During 1971,[44] the Superior Court disposed of the felony cases of 1,096 persons. Of these, 778 entered a plea of guilty and their convictions quickly became final. The remaining 318 defendants went to trial and, while information on the number actually convicted is not available, it is known that the District of Columbia Court of Appeals was "current" at the end of 1971 and setting appeals for argument within thirty days from the time the last brief was filed. Annual Report of the District of Columbia Courts, pp. 2, A-3 (1971). Thus, only a relatively few of the many felony defendants whose cases have come before the Superior Court go to trial, and, of these, fewer still have their convictions pending on appeal at any given time.

By the same token, the designation provisions of 11 D.C. Code §908(c) permits Article III judges to sit in the Superior Court during the short interim period it would take Congress to enact corrective legislation if appellant were to prevail. In short, while there are substantial constitutional rights at stake in this case, there are no dire "implications" to thwart vindication of those rights.

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[43] See also the arguments advanced by the Government in *Warner v. Flemings*, No. 71-1398, and *Gosa v. Mayden*, No. 71-6314, now pending *sub judice* before the Court.

[44] We are informed that the 1972 Annual Report will shortly be issued and will contain the corresponding information for the calendar year ending December 31, 1972.

III.

In response to the Government's Fourth Amendment argument (Gov't Br. at 49-56), we make three points:

1. The police conduct which the Government says is "so routine that no indignity or affront can be inferred" (Gov't Br. at 54) consisted of the actions of four plain clothes officers in two unmarked police cars who forced appellant to the side of the road so that one officer could inspect appellant's license and registration credentials, another could observe with the aid of his flashlight "everything that might be inside the car" (A. 37), and the remaining two officers could "assist" (A. 29). All of this was done pursuant to a policy of making "spot checks" and recording on informal forms personal data regarding the driver and all occupants which are turned in to the special operations division (A. 36). Indeed, directly contrary to the Government's assertion, the police officer who decided to make this particular stop flatly testified that "I don't know what a routine traffic check is" (A. 29).

2. The Government's reliance on *United States v. Biswell*, 406 U.S. 311, is surprising. In this case, as contrasted with *Biswell*, Congress has not authorized the police to stop automobiles as the method of enforcing driver's license and registration laws. Compare 18 U.S.C. §923(g) with 40 D.C. Code §§104(a), 301(c). Moreover, to equate the "justifiable expectation of privacy" of a dealer in firearms with that of a motorist who has violated no law or ordinance is to ignore the realities of contemporary urban life.

3. The suggestion that the permissibility of particular regulatory legislation insulates from Fourth Amendment scrutiny the means of insuring compliance (Gov't Br. at

52-55) runs directly afoul of the repeated holdings of this Court. *E.g., United States v. Biswell*, 406 U.S. 311; *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *See v. City of Seattle*, 387 U.S. 541. The suggestion that the unannounced inspection of a firearms' dealer pursuant to explicit statutory authority upheld in *Biswell* authorizes individual police officers, each for his own reasons (A. 21), to stop motorists at will without statutory authority is startling. Cf. *United States v. Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971).

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
*Attorney for Appellant**

*Elizabeth J. Branda, Alan S. Gover, and Lee M. Weisz, students at Georgetown University Law Center but not members of the bar of this Court, assisted in the preparation of this reply brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-11

ROOSEVELT F. PALMORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT
OF COLUMBIA COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR APPELLANT

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20006

Attorney for Appellant

Washington, D.C. • THIEL PRESS • (202) 393-0625

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SUPPLEMENTAL BRIEF FOR APPELLANT

Pursuant to Rule 41(5) of the Rules of this Court, appellant tenders this supplemental brief for the sole purpose of calling to the Court's attention a late authority which was not generally available when the parties prepared their respective briefs.*

*The late authority is Hart and Wechsler, *The Federal Courts and the Federal System* (2nd ed. 1973), which was revised by Professors Paul M. Bator and David L. Shapiro of Harvard University, Professor Paul J. Mishkin of the University of Pennsylvania, and Professor Herbert Wechsler of Columbia University. This work, although published in January, 1973, was not generally available when the briefs of the parties were prepared. We have tendered a copy of this new edition to the Solicitor General for his perusal prior to the argument of this case.

Both the Government (Gov't Br. at 28, 29, 37) and appellant (Reply Br. at 8-9) have relied on the 1953 edition of Professor Hart and Wechsler's treatise, and particularly the "Note on Legislative Courts" set forth therein. A new second edition of this treatise has now been published which differs in material respects from the edition on which the parties relied. The new edition omits the quotation to which the Government has referred (Gov't Br. at 37) and has added the following comment on the issue raised by this case:

> "Do criminal prosecutions by the federal government present a special case? (Recall the special mention of such cases in Article III itself.) Note that Congress could presumably have such cases tried in the state courts (at least if it chose not to create federal trial courts); note, too, that the territorial courts exercised criminal as well as civil jurisdiction. Nevertheless, legislation assigning the trial of federal criminal cases, prosecuted within the United States, to federal tribunals unprotected by the guarantees of Article III could not be justified today, could it? Review, in this connection, the cases discussed in the *Note on Court Martial Jurisdiction*, p. 372, *supra*. The language in some of them—notably Toth and O'Callahan—clearly suggest that the Court will view with the highest disfavor any attempt to encroach on the jurisdiction of the Article III courts over federal criminal cases.
>
> Military courts martial are, of course, themselves a very special case: they are tribunals (as is the Court of Military Appeals) created pursuant to the explicit authority in Article I to "make Rules for the Government and Regulation of the land and naval Forces."

What about prosecutions brought by the federal government to try Americans for offenses against American law committed abroad: could Congress create civilian legislative courts to hear such cases? (Recall that the cases discussed in the *Note on Court Martial Jurisdiction* all involved *military* tribunals). Compare Madsen v. Kinsella, 343 U.S. 341 (1952), upholding the power of the President as commander-in-chief to establish the United States Courts of the Allied High Commission for Germany for the trial of nonmilitary crimes by American citizens and others; *cf.* Rose v. McNamara, 375 F.2d 924 (D.C. Cir. 1967) (relating to a conviction in Okinawa)."

Hart and Wechsler, *The Federal Courts and The Federal System* 397 (2nd ed., 1973).

Respectfully submitted,

FRANK F. FLEGAL
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20006
Attorney for Appellant

February 16, 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PALMORE *v.* UNITED STATES

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 72-11. Argued February 21, 1973—Decided April 24, 1973

Palmore was convicted of a felony in violation of the District of Columbia Code by the Superior Court of the District of Columbia. The District of Columbia Court of Appeals, rejecting Palmore's contention that he was entitled to be tried by an Art. III judge with lifetime tenure and salary protection, affirmed, concluding that under the plenary power to legislate for the District of Columbia conferred by Art. I, § 8, cl. 17, of the Constitution, Congress had "constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine . . . particular criminal cases within the District." Palmore seeks to invoke this Court's appellate jurisdiction on the basis of 28 U. S. C. § 1257 (2), which provides for an appeal to this Court from a final judgment upholding the validity of "a statute of any state" against a claim that it is repugnant to the Constitution. *Held:*

1. The District of Columbia Code is not a state statute for purposes of § 1257 (2), and the lower court's upholding of the federal statute is therefore not reviewable by appeal but by certiorari. Pp. 4–7.

2. Not every judicial proceeding that implicates a charge, claim, or defense based on an Act of Congress or a law made under its authority must be presided over by an Art. III judge. Pp. 8–20.

(a) The jurisdictional grant respecting "such inferior Courts as the Congress may from time to time ordain and establish" requires neither that only Art. III courts hear and decide cases within the judicial power of the United States nor that each inferior court be invested with all the jurisdiction flowing from Art. III, and federal criminal laws have been enforced by state, territorial, and military courts and judges who did not enjoy the Art. III protections. Pp. 8–15.

no traffic or other violation was then indicated, the officer stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Palmore, the driver of the vehicle, produced a rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. During this time, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Palmore was arrested and later charged with the felony of carrying an unregistered pistol in the District of Columbia after having been convicted of a felony, in violation of the District of Columbia Code, § 22-3204 (1967).[1] He was tried and found guilty in the Superior Court of the District of Columbia.

Under Title I of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (Reorganization Act),[2] the judges of the Superior

[1] The section provided:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

[2] Before passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (Reorganization Act), the local court system consisted of one appellate court and three trial courts, two of which, the juvenile court and the tax court, were courts of special jurisdiction. The third trial court, the District of Columbia Court of General Sessions, was one of quite limited jurisdiction, its criminal jurisdiction consisting solely of that exercised concurrently with the United States District Court over misdemeanors and petty offenses. D. C. Code § 11-963 (1967). The court's civil jurisdiction was restricted to cases where the amount

Court are appointed by the President and serve for terms of 15 years. D. C. Code, §§ 11–1501 (a), 11–1502.[2] Palmore moved to dismiss the indictment against him,

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in controversy did not exceed $10,000, and it had jurisdiction over cases involving title to real property only when it was part of a divorce action. *Id.*, at §§ 11–961 and 11–1141. The judgments of the appellate court, the District of Columbia Court of Appeals, were subject to review by the United States Court of Appeals for the District of Columbia. *Id.*, at 11–321.

The United States District Court for the District had concurrent jurisdiction with the Court of General Sessions over most of the criminal and civil matters handled by that court, *id.*, at §§ 11–521, 11–522, and 11–523, and had exclusive jurisdiction over felony offenses, even though committed in violation of locally applicable laws, *id.*, at § 11–521. Thus the District Court was filling the role of both a local and federal court.

Seeking to improve the performance of the court system, Congress, in Title I of the Reorganization Act, invested the local courts with jurisdiction equivalent to that exercised by state courts. S. Rep. No. 91–405, 91st Cong., 1st Sess., 2–3; H. R. Rep. No. 91–907, 91st Cong., 2d Sess., 23–24. The three former trial courts were combined into the new Superior Court of the District of Columbia, D. C. Code § 11–901, which was vested, with minor exception, *id.*, at § 11–502 (3), with exclusive jurisdiction over all criminal cases, including felonies, brought under laws applicable exclusively to the District, *id.*, at § 11–923 (b). Its civil jurisdiction reached all civil actions and any other matter at law or in equtiy, brought in the District of Columbia, except those in which exclusive jurisdiction was vested in the United States District Court. *Id.*, at § 11–921. The local appeals court, the District of Columbia Court of Appeals, would ultimately not be subject to review by the United States Court of Appeals, *id.*, at § 11–301, and was declared to be the "highest court of the District of Columbia" for purposes of further review by this Court. *Id.*, at § 11–102.

In addition to the shift in jurisdiction, the number of local judges was increased, their tenure was lengthened from 10 to 15 years, and their salaries were increased and fixed at a percentage of that of judges of the United States courts. *Id.*, at §§ 11–702, 11–703, 11–903, 11–904, and 11–1502; D. C. Code §§ 11–702, 11–902, 11–1502, 47–2402 (1967). The Reorganization Act established a Commission on Judicial Disabilities and Tenure to deal with sus-

[*Footnote 3 is on p. 4*]

urging that only a court "ordain[ed] and establish[ed]" in accordance with Art. III of the United States Constitution could constitutionally try him for a felony prosecution under the District of Columbia Code. He also moved to suppress the pistol as the fruit of an illegal search and seizure. The motions were denied in the Superior Court, and Palmore was convicted.

The District of Columbia Court of Appeals affirmed, concluding that under the plenary power to legislate for the District of Columbia, conferred by Art. I, § 8, cl. 17, of the Constitution, Congress had "constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine these particular criminal cases within the District." 290 A. 2d 573, 576-577 (1972). Appellant filed a notice of appeal with the District of Columbia Court of Appeals and his jurisdictional statement here, purporting to perfect an appeal under 28 U. S. C. § 1257 (2). We postponed further consideration of our jurisdiction to review this case by way of appeal to the hearing on the merits. 409 U. S. 840 (1972).

II

28 U. S. C. § 1257 [4] specifies the circumstances under which the final judgments of the highest court of a State may be reviewed in this Court by way of appeal or

pension, retirement, or removal of local judges, D. C. Code § 1521 *et seq.* It also provided for improved administration of the local courts, *id.*, at § 11-1701 *et seq.*, including authorization for an Executive Officer responsible for the administration of the local court system. *Id.*, at § 11-1703.

[3] The 15-year term is subject to the provision for mandatory retirement at age 70. D. C. Code § 11-1502.

[4] 28 U. S. C. § 1257 provides:

"Final judgments or decrees rendered by the highest court of

writ of certiorari. As amended in 1970 by § 172 (a)(1) of the Reorganization Act, 84 Stat. 590, the term "highest court of a State" as used in § 1257 includes the District of Columbia Court of Appeals. Appeal lies from such courts only where a statute of the United States is stricken down, 28 U. S. C. § 1257 (1), or where a statute of a State is sustained against federal constitutional attack, id., at § 1257 (2). Because the statute at issue was upheld in this case, an appeal to this Court from that judgment lies only if the statute was a "statute of any state" within the meaning of § 1257 (2). Palmore insists that it is, but we cannot agree.

The 1970 amendment to § 1257 plainly provided that the District of Columbia Court of Appeals should be treated as the "highest court of a State," but nowhere in § 1257, or elsewhere, has Congress provided that the words "statute of any state," as used in § 1257 (2), are to include the provisions of the District of Columbia Code. A reference to "state statutes" would ordinarily not include provisions of the District of Columbia Code,

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a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

which was enacted not by a state legislature, but by Congress, and which applies only within the boundaries of the District of Columbia. The District of Columbia is constitutionally distinct from the States, *Hepburn* v. *Ellzey*, 2 Cranch 445 (1805); cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 (1949). Nor does it follow from the decision to treat the District of Columbia Court of Appeals as a state court that the District Code was to be considered a state statute for the purposes of § 1257. We are entitled to assume that in amending § 1257, Congress legislated with care, and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly, and not left the matter to mere implication.[4]

Jurisdictional statutes are to be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U. S. 206, 212 (1968); and we are particularly prone to accord "strict construction of statutes authorizing appeals" to this

[4] An express provision "would have been easy," *Farnsworth* v. *Territory of Montana*, 129 U. S. 104, 113 (1889), as demonstrated by specific provisions in the United States Code concerning the District of Columbia. Cf. 28 U. S. C. § 1363, added to the United States Code by § 172 (c) (1) of the Reorganization Act, 84 Stat. 590, where for purposes of c. 85 dealing with the jurisdiction of the United States District Courts, it is provided that "references to laws of the United States or Acts of Congress" do not include laws applicable exclusively to the District of Columbia." See also the treatment of the District of Columbia as a "State" for purposes of diversity jurisdiction, 28 U. S. C. § 1332 (d), and the equally discrete provision of 28 U. S. C. § 1451, added to the Code by § 172 (d) (1) of the Reorganization Act, 84 Stat. 591, which provides that for purposes of the removal provisions, the Superior Court of the District of Columbia is to be considered a "State court", and the District of Columbia, deemed to be a "State."

Court. *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42 n. 1 (1970). We will not, therefore, hold that Congress intended to treat the District of Columbia Code as a state statute for the purposes of § 1257 (2). Cf. *Farnsworth* v. *Territory of Montana*, 129 U. S. 104, 112–114 (1889).

Palmore relies on *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), where an enactment of the territorial legislature of Puerto Rico was held to be a statute of a State within the meaning of the then applicable statutory provisions governing appeals to this Court. That result has been codified in 28 U. S. C. § 1258; but even so, the *Balzac* rationale was severely undermined in *Fornaris*, where we held that a statute passed by the legislature of Puerto Rico is not "a State statute" within the meaning of 28 U. S. C. § 1254 (2), and that it should not be treated as such in the absence of more definitive guidance from Congress.

We conclude that we do not have jurisdiction of the appeal filed in this case. Palmore presents federal constitutional issues, however, that are reviewable by writ of certiorari under § 1257 (3); and treating the jurisdictional statement as a petition for writ of certiorari, cf. 28 U. S. C. § 2103, we grant the petition limited to the question of whether Palmore was entitled to be tried by a court ordained and established in accordance with Art. III, § 1, of the Constitution.* It is to this issue that we now turn.

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*Because we postponed the question of our jurisdiction over this appeal to consideration of the merits, rather than entering an unrestricted notation of probable jurisdiction, there is no basis for inferring, from our finding this appeal improper, that our initial order must nevertheless be taken as having granted certiorari on any of the issues presented. Hence, our denial of the writ with respect to the Fourth Amendment claim, rather than a dismissal, is proper. Cf. *Mishkin* v. *New York*, 383 U. S. 502, 512–513 (1966).

III

Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress "may exercise within the District all legislative powers that the legislature of a State might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District.[1] It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8. See *Gibbons* v. *District of Columbia*, 116 U. S. 404, 408 (1886).

Pursuant to its Clause 17 authority, Congress has from time to time enacted laws that comprise the District of Columbia Code. The 1970 Reorganization Act amended

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[1] *Kendall* v. *United States*, 12 Peters 524, 619 (1838); *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690 (1878); *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407 (1886); *Shoemaker* v. *United States*, 147 U. S. 282, 300 (1893); *Atlanta Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 435 (1932); *O'Donoghue* v. *United States*, 289 U. S. 516, 545 (1933).

the Code by creating the Superior Court for the District of Columbia and the District of Columbia Court of Appeals, the courts being expressly "established pursuant to article I of the Constitution." D. C. Code § 11–101 (2). See n. 2, *supra*. The Superior Court, among other things, was vested with jurisdiction to hear criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia, D. C. Code § 11–923; the District of Columbia Court of Appeals, with jurisdiction to hear appeals in such cases. *Id.*, at § 11–721. At the same time, Congress exercised its powers under Art. I, § 8, cl. 9, and Art. III to redefine the jurisdiction of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. *Id.*, at §§ 11–301, 11–501, and 11–502. As the report of the Committee on The District of Columbia said, H. R. Rep. No. 91–907, 91st Cong., 2d Sess., 44:

> "This title makes clear (§ 11–101) that the District of Columbia courts (the District of Columbia Court of Appeals and the Superior Court of the District of Columbia) are Article I courts, created pursuant to Art. I, section 8, clause 17 of the United States Constitution, and not Article III courts. The authority under which the local courts are established has not been statutorily provided in prior law; the Supreme Court of the United States has not declared the local system to be either Article I or Article III courts, decisions having indicated that the District of Columbia courts are, in this respect, both fish and fowl. This expression of the intent of Congress clarifies the status of the local courts."

It was under the judicial power conferred on the Superior Court by the 1970 Reorganization Act that Palmore was convicted for violation of § 22–3204 of the District of

Columbia Code (1967). The conviction was clearly within the authority granted Congress by Art. I, § 8, cl. 17, unless, as Palmore contends, Art. III of the Constitution requires that prosecutions for District of Columbia felonies must be presided over by a judge having the tenure and salary protections provided by Art. III.[1] Palmore's argument is straightforward: Art. III vests the "judicial Power" of the United States in courts with judges holding office during good behavior and whose salary cannot be diminished; the "judicial Power" that

[1] Sections 1 and 2 of Art. III state:

"SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

"SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

these courts are to exercise "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."; the District of Columbia Code, having been enacted by Congress, is a law of the United States; this prosecution for violation of § 22-3204 of the Code is therefore a case arising under the laws of the United States, involves an exercise of the "judicial Power" of the United States, and must therefore be tried by an Art. III judge.

This position ultimately rests on the proposition that an Art. III judge must preside over every proceeding in which charge, claim or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III. In our view, however, there is no support for this view in either constitutional text or in constitutional history and practice.

Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. "[T]he judicial powers of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent

for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis*, 3 How. 236, 245 (1845).[1] Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges. Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts. Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III. See Warren,

[1] This was the view of the Court prior to *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). *Turner* v. *Bank of North America*, 4 Dall. 8 (1799); *United States* v. *Hudson*, 7 Cranch 32 (1812). And the contrary statements in *Hunter's Lessee*, *supra*, at 327–330, did not survive later cases. See for example, in addition to *Cary* v. *Curtis*, 3 How. 236 (1845), quoted in the text, *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721–722 (1838); *Sheldon* v. *Sill*, 8 How. 441 (1850); *Case of the Sewing Machine Companies*, 18 Wall. 553, 577–578 (1874); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234 (1922).

Federal Criminal Laws and the State Courts, 38 Harv. L. Rev., 545, 551–553, 570–572 (1925); Frankfurter and Landis, The Business of the Supreme Court, 293 (1927); note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966 (1947). More recently, this Court unanimously held that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws; "... that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a 'valid excuse.'" *Testa* v. *Katt*, 330 U. S. 386, 392 (1947). Although recognizing the contrary sentiments expressed in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 615–616 (1842), and other cases, the sense of the *Testa* opinion was that it merely reflected long-standing constitutional decision and policy represented by such cases as *Claflin* v. *Houseman*, 93 U. S. 130 (1876), and *Mondou* v. *New York, New Haven & Hartford R. Co.*, 223 U. S. 1 (1912).

It is also true that throughout our history, Congress has exercised its power under Art. IV to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" by creating territorial courts and manning them with judges appointed for a term of years. These courts have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory. Speaking for a unanimous Court in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), Chief Justice Marshall held that the territorial courts of Florida, although not Art. III courts, could hear and deter-

mine cases governed by the admiralty and maritime law that ordinarily could be heard only by Art. III judges. "[T]he same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." *Id.*, at 546. This has been the consistent view of this Court.[10] Territorial courts, therefore, have regularly tried criminal cases arising under the general laws of Congress,[11] as well as those brought under territorial laws.[12]

There is another context in which criminal cases arising under federal statutes are tried, and defendants convicted, in non-Article III courts. Under its Art. I, § 8, cl. 14, power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Art. III. Within their proper sphere, courts-martial are constitutional instruments to carry out congressional and executive will. *Dynes* v. *Hoover*, 20 How. 65, 79, 82 (1858).

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[10] *Clinton* v. *Englebrecht*, 13 Wall. 434, 447 (1872); *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655–656 (1874); *Reynolds* v. *United States*, 98 U. S. 145, 154 (1878); *The "City of Panama,"* 101 U. S. 453, 460 (1880); *McAllister* v. *United States*, 141 U. S. 174, 180–184 (1891); *United States* v. *McMillan*, 165 U. S. 504, 510 (1897); *Romero* v. *Todd*, 206 U. S. 358, 369 (1907); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 544–548 (1962).

[11] See, *e. g.*, *Baker* v. *United States*, 1 Wis. 641 (1846); *United States* v. *Tom*, 1 Ore. 20 (1853); *Franklin* v. *United States*, 1 Colo. 35 (1867); *Pickett* v. *United States*, 1 Idaho 523 (1874); *United States* v. *Reynolds*, 1 Utah 226 (1875); *Fisher* v. *United States*, 1 Okla. 282 (1892).

[12] See, *e. g.*, *Territory of Oregon* v. *Coleman*, 1 Ore. 191 (1855); *Gile* v. *People*, 1 Colo. 60 (1867); *People* v. *Waters*, 1 Idaho 369 (1874); *People* v. *Shuler*, 1 Utah 260 (1875); *Ex parte Larkin*, 1 Okla. 53 (1891).

The "exigencies of military discipline require the existence of a special system of military courts in which not all of the special procedural protections deemed essential in Art. III trials need apply," *O'Callahan* v. *Parker*, 395 U. S. 258, 261 (1969); and "the Constitution does not provide life tenure for those performing judicial functions in military trials," *Toth* v. *Quarles*, 350 U. S. 11, 17 (1955).

"The same confluence of practical considerations that dictated the result in [*American Ins. Co.* v. *Canter*, *supra*], has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure," *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 547 (1962), such as the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76, 85–86 (1894); the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); *Ex parte Joins*, 191 U. S. 93 (1903); *Wallace* v. *Adams*, 204 U. S. 415 (1907); courts created in unincorporated districts outside the mainland, *Downes* v. *Bidwell*, 182 U. S. 244, 266–267 (1901); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922), and the Consular Courts established by concessions from foreign countries, *In re Ross*, 140 U. S. 453, 464–465, 480 (1891).

IV

Whatever may be true in other instances, however, it is strongly argued that *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), constrains us to hold that all of the courts of the District of Columbia must be deemed Art. III courts and that the judges presiding over them must be appointed to serve during their good behavior in accordance with the requirements of Art. III. *O'Donoghue* involved the question whether the judges of the District of Columbia's Supreme Court and Court of Appeals were constitutionally protected from having their salaries reduced by an Act of Congress. This Court, over

three dissents and contrary to extensive prior dicta, see *Ex parte Bakelite Corp.*, 279 U. S. 438, 450 (1929); *Butterworth v. Hoe*, 112 U. S. 50 (1884); *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923); *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464 (1930), held that the two courts under consideration were constitutional courts exercising the judicial power of the United States and that the judges in question were not subject to the salary reduction legislation as they would have been had they been judges of legislative courts.

We cannot agree that *O'Donoghue* governs this case.[11] The District of Columbia courts there involved, the Supreme Court and the Court of Appeals, had authority only in the District, but also over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application. These courts, as this Court noted in its opinion were "of equal rank and power with those of other inferior courts of the federal system . . . ." *O'Donoghue*, *supra*, at 534. Relying heavily on congressional intent, the Court considered that Congress,

[11] We should note here that in *Glidden Co.* v. *Zdanok*, *supra*, it was urged that Art. III forbade the assignment of a judge of a Court of Customs and Patent Appeals to try a criminal case arising under the District of Columbia Code. The Court of Appeals ruled that even if the judge in question was not an Art. III judge, Art. I, § 8, cl. 17, was sufficient authority for his assignment to try cases in the District. The United States here urged that this was true at least with respect to laws arising under the District of Columbia Code rather than under a law of national application. Mr. Justice Harlan, for himself, and Justices BRENNAN and STEWART, found it unnecessary to reach this question, but considered it an open one, for he expressly reserved "intimating any view as to the correctness of the holding below . . ." 370 U. S., at 538. Apparently, for him, *O'Donoghue* had not foreclosed the issue with respect to the trial of the criminal case under the District of Columbia Code. Mr. Justice Clark, for himself and the Chief Justice, also thought the question open. See *id.*, at 589 n. 4.

by consistently providing the judges of these courts with lifetime tenure, had indicated a "congressional practice from the beginning [which] recognize[d] a complete parallelism between the courts of the District [of Columbia] and the district and circuit courts of appeals of the United States." *Id.*, at 549. Moreover, these courts, constituted as they were, and being closer to the legislative department, "exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments," *id.*, at 535, and were the only courts within the District in which District inhabitants could exercise their "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III." *Id.*, at 540.

The case before us is a far cry from *O'Donoghue*. Here Congress has expressly created two systems of courts in the District. One of them, made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, are constitutional courts manned by Art. III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. The other system is made up of strictly local courts, the Superior Court and the District of Columbia Court of Appeals. These courts were expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia, D. C. Code § 11-101 (2), and to exercise the "powers of . . . a State government in all cases where legislation is possible." *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147 (1889).

The *O'Donoghue* Court had before it District of Columbia courts in which the consideration of "purely local affairs [was] obviously subordinate and incidental."

O'Donoghue, supra, at 539. Here, on the other hand, we have courts the focus of whose work is primarily upon cases arising under the District of Columbia Code and to other matters of strictly local concern. They handle criminal cases only under statutes that are applicable to the District of Columbia alone. *O'Donoghue* did not concern itself with courts like these, and it is not controlling here.

V

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

From its own studies, Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor

those of strictly local cognizance were being promptly tried and disposed of by the existing court system. See, *e. g.*, 115 Cong. Rec. 25538 (1969); 116 Cong. Rec. 8091–8092 (1970).[14] The remedy in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, the trial of cases arising under the Constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctive local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction. S. Rep. No. 91–405, 91st Cong., 1st Sess., 1–3, 5, 18; H. R. Rep. No. 91–907, *supra*, at 23–24, 33.

Furthermore, Congress, after careful consideration, determined that it preferred, and had the power to utilize,

[14] The Senate Committee noted that notwithstanding the visiting judge program, "an unsurpassed number of days on the bench per district court judge," and as many as 12 out of the 14 District Court judges being "assigned full time to the trial of the local felony offenses," the blacklog of criminal cases in the United States District Court numbered 1,669, and the median time lapse from filing to final disposition in felony trials in that court was more than triple that in other district courts. Additionally, the median time for civil jury trial in the District Court was nearly double that in other district courts. Though there had been an increase in the number of felonies committed in the District of Columbia, there was a concomitant decrease in the number of felonies prosecuted. S. Rep. No. 91–405, *supra*, at 2–3.

a local court system staffed by judges without lifetime tenure. *Id.*, at 17–18; H. R. Rep. No. 91–907, *supra*, at 44. Congress made a deliberate choice to create judgeships with terms of 15 years, D. C. Code § 11–1502, and to subject judges in those positions to removal or suspension by a judicial commission under certain established circumstances. *Id.*, at §§ 11–1502, 11–1521 *et seq.* It was thought that such a system would be more workable and efficient in administering and discharging the work of a multifaceted metropolitan court system. See S. Rep. No. 91–405, *supra*, at 8–11; H. R. Rep. No. 91–907, *supra*, at 35–39.

In providing for fixed terms of office, Congress was cognisant of the fact that "virtually no State has provided" for tenure during good behavior, S. Rep. No. 91–405, *supra*, at 8, see H. R. Rep. No. 91–907, *supra*, at 38, the District of Columbia Court of Appeals noting that 46 of the 50 States have not provided life tenure for trial judges who hear felony cases, 200 A. 2d, at 578 n. 12; and the provisions of the Act, with respect to court administration and to judicial removal and suspension, were considered by some as a model for the States. 115 Cong. Rec. 25538 (1969). See Hearings on H. R. 13689 and 12834 before Subcommittee No. 1 of the House Committee on the District of Columbia, 91st Cong., 1st Sess., pt. I, at 69, 71 (1969).

We do not discount the importance attached to the tenure and salary provisions of Art. III, but we conclude that Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the District in all cases whatsoever. Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for

a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprive them of due process of law under the Fourteenth Amendment.

The judgment of the District of Columbia Court of Appeals is affirmed.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-11

Roosevelt F. Palmore, Appellant, v. United States. | On Appeal from the District of Columbia Court of Appeals.

[April 24, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Appellant, indicted for carrying a dangerous weapon in violation of 22 D. C. Code § 3204, was tried and convicted in the Superior Court of the District of Columbia, an Art. I court created by Congress[1] under the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473. His timely objection is that he was tried, convicted, and sentenced by a court not established under Art. III.

The judges of the court that convicted him

—hold office for a term of fifteen years,[2] not for life as do Article III judges;

—unlike Article III judges,[3] their salaries are not protected from diminishment during their continuance in office;

[1] D. C. Code § 11-101 (2) provides, "The judicial power in the District of Columbia is vested in . . . (2) The following District of Columbia courts established pursuant to Article I of the Constitution: (A) The District of Columbia Court of Appeals. (B) The Superior Court of the District of Columbia."

[2] D. C. Code § 11-502.

[3] By Art. III, § 1, federal judges "hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

—unlike Article III judges, they can be removed from office by a five member Commission[4] through less formidable means of procedure than impeachment. While two of the five members must be lawyers (one a member of the District Bar in active practice for at least five of the ten years prior to his appointment and one an active or retired federal judge serving in the District) the other three may be laymen. One of the three must be a layman. D. C. Code § 11–1522.

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[4] A Commission on Judicial Disabilities and Tenure is established with the power "to suspend, retire, or remove" one of these judges. D. C. Code § 11–1521. The President names three members, the Commissioner of the District names one, and the Chief Judge of the District Court names the fifth. There are three alternate members. The President names the Chairman. *Id.*, § 11–1522. All members are appointed for a term of six years. *Id.*, § 11–1523. A judge must be removed if he has committed a felony and been finally convicted. *Id.*, § 11–1526 (a)(1). He shall be removed if the Commission finds

"(A) willful misconduct in office,

"(B) willful and persistent failure to perform judicial duties, or

"(C) any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute." *Id.*, § 11–1526 (a)(1).

He shall be involuntarily retired if "(1) the Commission determines that the judge suffers from a mental or physical disability (including habitual intemperance) which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of his judicial duties, and (2) the Commission files in the District of Columbia Court of Appeals an order of involuntary retirement and the order is affirmed on appeal or the time within which an appeal may be taken from the order has expired." *Id.*, § 11–1526 (b).

The Act also contains elaborate provisions for the suspension of the judge without salary, or with retirement salary, or with salary dependent on the circumstances described in §§ 11–1526 (c)(1), (2), and (3). The Act contains the procedure which the Commission must follow and the notice and hearing to which the judge is entitled. *Id.*, § 11–1527.

In other words, these Superior Court judges are not members of the independent judiciary which has been one of our proudest boasts, by reason of Art. III. The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes. The safeguards surround the judge and give him a measure of protection against the hostile press, the leftist or rightist demands of the party in power, the glowering looks of those in the top echelon in whose hands rest the power of reappointment.

In the Constitutional Convention of 1787 it was proposed that judges "may be removed by the Executive on the application by the Senate and House of Representatives." It was defeated, only Connecticut voting for it. Wilson apparently expressed the common sentiment: "The Judges would be in a bad situation, if made to depend on any gust of faction which might prevail in the two branches of our Government." [5]

Without the independence granted and enjoyed by Art. III judges, a federal judge could more easily become the tool of a ravenous Executive Branch. This idea was reflected in Reports by Congress in 1965,[6] sponsoring a law that would give lifetime tenure to federal judges in Puerto Rico. The House Report stated: [7]

> ". . . Federal litigants in Puerto Rico should not be denied the benefit of judges made independent by life tenure from the pressures of those who might influence his chances of reappointment, which benefits the constitutional guarantees to the litigants in all other Federal courts."

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[5] Madison, Journal of the Federal Convention (Albert Scott & Co. 1893) pp. 614–615.

[6] H. R. Rep. No. 135, 89th Cong., 1st Sess.; S. Rep. No. 1504, 89th Cong., 2d Sess.

[7] H. R. Rep. No. 135, *supra*, n. 6, at 2.

Art. I, § 8, cl. 17, of the Constitution provides: "The Congress shall have Power . . . To exercise exclusive Legislation . . . over such District . . . as may . . . become the Seat of the Government of the United States. . . ." This legislative power is plenary, giving Congress authority to establish the method by which the District of Columbia will be governed, and to alter from time to time the form of that government. *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 104–110.

Legislative courts may be given executive and administrative duties, the examples being well known. But if they are given "judicial power," as are the judges of the present Superior Court of the District, those trials have guarantees that are prescribed by the Constitution and Bill of Rights. First, as to jury trial, Art. III says "The Trial of all Crimes . . . shall be by Jury." But trial by jury is also guaranteed by the Sixth Amendment in all criminal prosecutions. Even Mr. Justice McReynolds and Mr. Justice Butler, not known as libertarians, thought "all" meant "all," not permitting the exclusions of so-called "petty" offenses. *District of Columbia* v. *Clawans*, 300 U. S. 617, 633. Congress may not deprive an accused of that protection in a District of Columbia trial. *District of Columbia* v. *Colts*, 282 U. S. 63, 74; *Callan* v. *Wilson*, 127 U. S. 540.

The Fifth Amendment provides for the right to indictment; and Congress may not dispense with that right for a local criminal offense in the District of Columbia. *United States* v. *Moreland*, 258 U. S. 433.

The Sixth Amendment's guarantee extends to speedy and public trials, the right of confrontation, compulsory process and the assistance of counsel "in all criminal prosecutions."

The Fifth Amendment guarantees one against double jeopardy and gives the privilege against self-incrimination "in any criminal case," and guarantees that no one

shall "be deprived of life, liberty, or property without due process of law."

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . ."

The Eighth Amendment says that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Few, if any, of these guarantees, I assume, would be applicable to Art. I tribunals exercising legislative or administrative functions. But are any of them inapplicable in criminal prosecutions where the "judicial power" of the United States is exercised?

I have been unable to see how that is possible. Yet if those aspects of "judicial Power," as the term is used in Art. III, are all applicable, how can the requirements for an independent judiciary be made an exception? For it is as clearly required by Art. III for any exercise of "judicial Power" as are the other guarantees.

The legislative history of the District of Columbia Court Reform and Criminal Procedure Act of 1970 makes abundantly clear that one main purpose was the creation of some political leverage over Superior Court judges. As the Senate Report states:

"In drafting the tenure provision of the amended bill, the committee was conscious both of the inexactness of the art of judicial selection and of the importance of tenure in attracting the most competent men to the bench. The committee recognized that the constitutional requirement of 'good behavior' tenure has played a significant role in the historic high quality of the Federal bench. On the other hand, the committee was aware that virtually no State has provided such tenure for its judges, an apparent recognition that the opportunity to review the quality of a judge's performance also has

its obvious advantages. The committee, therefore, sought a tenure provision that would combine the attractiveness of the federal system with the opportunity for some review of the judge's work.

. . . .

"At present, the only means available to rid the local bench of a sick or venal judge is through the process of impeachment by the House of Representatives and trial by the U. S. Senate. To believe that the Congress at this time in our history has the time to police the local judiciary through the impeachment process is just not realistic. That process has not even proven viable when the conduct of Federal, good behavior tenure judges is drawn into question." S. Rep. No. 91-405, 91st Cong., 1st Sess., 8, 11.

In *O'Donoghue* v. *United States*, 289 U. S. 516, the Court held unconstitutional an Act of Congress reducing the salaries of trial and appellate judges in the District of Columbia. It held that inherent in the separation of powers was the idea that "the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments." *Id.*, at 530. Since the District was formed of portions of two of the original States, the Court concluded it was "not reasonable to assume that the cession stripped them of these rights (rights, guaranties and immunities of the Constitution) and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *Id.*, at 540. The Court concluded that while Congress could not confer administrative or legislative functions on Art. III courts, it could grant such functions to District courts by reason of Art. I. *Id.*, at 546. But that power, it held, may not be used "to destroy the operative effect of the judicial

clause within the District." *Id.*, at 546. The present Act does precisely that. Hence we make today a major retreat from *O'Donoghue*.

Much is made of the fact that many States (about three-fourths of them) have their judges at all levels elected by the people. That was one of the basic Jacksonian principles. But the principle governing federal judges is strongly opposed.[8] Hamilton stated the proposition in No. 79 of the Federalist (Cooke ed. 1961):

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government, in every

[8] See Brown, The Rent in Our Judicial Armor, 10 Geo. Wash. L. Rev. 127 (1941); Hyde, Judges: Their Selection and Tenure, 22 N. Y. U. L. Q. Rev. 389 (1946); Haynes, Selection and Tenure of Judges (1944); Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665 (1969).

James Bryce, writing in 1189, said "Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of Knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans forts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce, intimidate, they discourage independence." American Commonwealth, c. 42.

state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.'

"This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him."

That theory is opposed to the Jacksonian philosophy concerning election of state judges. But the present statutory scheme for control over Superior Court judges is even opposed to the Jacksonian theory. In the District of Columbia the people do not elect these Art. I judges. Nor do they "recall" them as is done in some States. The Superior Court judges are named by the President and confirmed by the Senate and they are removable by a commission appointed by the President. The Superior Court judge has no opportunity to put his problems, his conduct, his behavior on the bench to the people. The gun of the commission is held at his head. All of the normal vices of a dependent, removable judiciary are accentuated in the District of Columbia.

The problems of "law and order" naturally assume in the minds of a majority of the people in the District an acute and special problem. A minority, however, sits as overlord, causing tensions to mount. The case of Harry Alexander, a judge on the Superior Court, has become prominent. Great pressures have been put on him to conform—or else. The problem goes not only to the viability of life in the District but to the vitality of the guarantees in Art. III and in the Bill of Rights. Those guarantees run to every "person"; and the judges on the Art. III courts who sit in the District dispense justice evenly and never undertake to ration it. But some judges, like the Bill of Rights, are in the minds of some a threat to our security.

They, however, insure our security by administering justice evenhandedly. The ideals of Art. III and the Bill of Rights provide the mucilage which holds majorities and minorites together in the federal segment of our Nation, and make tolerable the existence of nonconformists who do not walk to the measure of the beat of the Chief Drummer.

We take a great step backward today when we deprive our federal regime in the District of that judicial independence which helps insure fearless and evenhanded dispensation of justice. No federal court exercising Art. III judicial power should be made a minion of any cabal that from accidents of politics comes into the ascendency as an overlord of the District of Columbia. That effort unhappily succeeds today and is in disregard of one of our most cherished constitutional provisions.

As Justice Black and I put it in our dissent in *Glidden Co. v. Zdanok*, 370 U. S. 530, 589, 598, the essential problem in dealing with a "judicial" function exercised by an Art. I court concerns the standards and procedures employed. If the power exercised is "judicial power" defined in Art. III, as was true in the present case, then the standards and procedures must conform to Art. III, one of which is an independent judiciary.

There have been many proposals in our history that are kin to those approved today, and the important ones are reviewed by Prof. Kurland.[9] To date efforts to tamper with the federal judiciary have not been successful, unless it be the bizarre decision of this Court in *Chandler v. Judicial Council*, 382 U. S. 1003, 1005, in which Justice Black and I dissented. The States, of course, have mostly gone the other way.[10] But as Prof. Kurland observed:[11]

> "... the various devices that the States have recently adopted for policing their judiciaries are little

[9] Kurland, *supra* n. 8.

[10] The California system is discussed by Jack E. Frankel, Executive Secretary of the California Commission on Removal of Judges; California Tackles an Old Problem, 49 Amer. Bar J. 168 (1963). Mr. Frankel was quoted with approval in the Senate Report proposing the District of Columbia Court Reform and Criminal Procedure Act of 1970. S. Rep. No. 91-405, 91st Cong., 1st Sess., p. 11.

[11] Kurland, *supra*, n. 8, at 668.

more than polite blackmail, suggestions that the bar is unhappy with the judge's behavior and he'd better shape up or else. I shudder to think how easily the federal courts might have been deprived of the services of Judge Learned Hand under such a system as California's. For politeness to counsel and a willingness to tolerate fools gladly were not among his virtues, and it is only such virtues and that of regular attendance at the court house that the policing systems seem capable of evoking from timid judges."

The way to achieve what is done today is by constitutional amendment. President Andrew Johnson in 1868 said: [12]

> "It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am fully sustained by the evidence of popular judgment upon this subject in the different States of the Union.
>
> "I therefore deem it my duty to recommend an amendment to the Constitution by which the terms of the judicial officers would be limited to a period of years, and I herewith present it in the hope that Congress will submit it to the people for their decision."

Manipulated judiciaries are common across the world, especially in communist and fascist nations. The faith in freedom which we profess and which is opposed to those ideologies assumes today an ominous cast. It is ominous because it indirectly associates the causes of crime with the Bill of Rights rather than with the

[12] 8 Message and Papers of the Presidents, 3841 (Richardson ed. 1897).

sociological factors of poverty caused by unemployment and disemployment, the abrasive political tactics used against minorities, the blight of narcotics and the like. Those who hold the gun at the heads of Superior Court judges can retaliate against those who respect the spirit of the Fourth Amendment and the Fifth Amendment and who stand firmly against the ancient practice of using the third degree to get confessions and who fervently believe that the end does not justify the means.

I would reverse the judgment below.